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# Separation of Powers and the Class Action

Mark K. Moller

*DePaul University College of Law*, [mmoller@depaul.edu](mailto:mmoller@depaul.edu)

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Mark Moller\*

## Separation of Powers and the Class Action

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## I. INTRODUCTION

We are, it has been said, in a "post-class-action" era—a product of a Supreme Court's increasing hostility to class certification.<sup>1</sup> That hostility has come in for a lot of criticism. Judge Jack Weinstein recently articulated one technocratic vein of this. The eclipse of the federal class action, he lamented, deprives federal courts of a potent tool for consolidating control over mass litigation.<sup>2</sup>

Weinstein is certainly right. The demise of federal courts' once-generous attitude toward class certification has ended up ceding control over significant chunks of mass tort litigation to state courts. The notorious Vioxx products liability litigation<sup>3</sup> is the classic example. There, thanks entirely to the inability to certify the claims as a federal class, tens of thousands of suits ended up in state courts, leading the Judicial Panel on Multidistrict Litigation ("MDL Panel") to engage in dubious creative efforts aimed at inducing state litigants to join a global settlement.<sup>4</sup> And Professor J. Maria Glover has found the pattern of "significant" mass tort spillage into state court persists today,

1. J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 5, 7 (2014).

2. See *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006) (lamenting the inability to achieve "final, global resolution of mass national disputes" as "use of the class action device to aggregate claims has become more difficult").

3. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010).

4. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2214 (2008).

despite changes to federal jurisdiction in the Class Action Fairness Act.<sup>5</sup>

The reason that taking away the class action device ends up leaving states in control of lots of cases is pretty simple. The scheme of federal jurisdiction relies to a significant degree on “litigant autonomy”—that is, the ability of litigants to control the enforcement of their own claims. Our jurisdictional scheme gives claim owners a broad choice of forums and, with that choice, substantial power to avoid federal court by exploiting control of their claims—through, for example, their selection of the theory of the case, their control over party structure, and the like.<sup>6</sup>

Individual claim owners inevitably have differing forum preferences. As result, giving each injured party control of her own claim means that substantial chunks of litigation will radiate out of federal courts’ reach as litigants exercise that control to park their claims in state court. Class actions, by contrast, override claim owners’ ability to leverage the jurisdictional power of claim-control. That is in no small part why class actions are such a potent vehicle for federal consolidation.

For fans of federal consolidation, like Judge Weinstein, this is a powerful reason to construe the federal class action rule broadly. Doing so would give federal courts power over mass litigation beyond what even the Class Action Fairness Act’s supporters envisioned.<sup>7</sup> But, in fact, the class action’s consolidating power actually highlights a reason to *defend* the Supreme Court’s narrow constructions of the federal class action rule—a reason that has gone unnoticed in the literature.

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5. Glover, *supra* note 1, at 10 (calling the “problem of parallel state court proceedings in the context of [federal] MDL litigation” a “significant” one); *see also* Sherman, *supra* note 4, at 2208 (predicting that *Vioxx* would become the norm if the Supreme Court continues to construe the scope for federal certification of mass torts narrowly).

6. *See, e.g.,* Lincoln Prop. Co. v. Roche, 546 U.S. 81, 91 (2005) (“In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties.”) (quoting 16 James WM. Moore, MOORE’S FEDERAL PRACTICE § 107.14[2][c] (3d ed. 2005)); Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 12 (2003) (“The [well-pleaded-complaint] rule makes the *plaintiff* the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”) (emphasis added) (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987)); Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 411 (7th Cir. 2000) (“[P]laintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum.”).

7. *See* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 613 (2008) (noting CAFA’s supporters were focused on throwing up barriers to the certification of large-scale class actions; the statute’s policy is anti-class action, rather than pro-federal-takeover of mass tort litigation).

This unnoticed argument is formal. It lies with the design of our system of separated powers. Control over jurisdictional policy lies with Congress. That control protects states from federal courts' incentives to arrogate power to themselves.<sup>8</sup> And modern doctrine enforces Congress's control over jurisdictional policy in a distinctive way—by directing federal courts to read rules that confer power on them, at the expense of states, narrowly.<sup>9</sup> This interpretive norm ties federal courts to the proverbial mast. It prevents them from exploiting ambiguity to grab power that Congress didn't intend to give them.<sup>10</sup>

Because litigant autonomy is so tightly woven into our scheme of limited federal jurisdiction, class actions—by overriding that autonomy—change how that scheme works. And they do so in a way that aggrandizes federal courts. Given all this, the class action has to be included in any principled application of the rule that “changes to the scheme of limited jurisdiction are construed narrowly.” Excluding it would blow a huge loophole in the framework protecting Congress's control over jurisdictional policy.<sup>11</sup>

This “jurisdictional” argument for narrow constructions of the class action turns out to have surprising implications for the current debate about the Court's class action cases. Scholars have almost uniformly focused on due process as the source of the protection for litigant au-

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8. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182 (1943) (reaffirming absolute congressional control over federal courts); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1274 (2001) (“[The] first principle of limited federal power supports a corollary notion: the scope of an institution's power—its jurisdiction—must be determined by a source outside that institution itself.”).
  9. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008) (emphasizing the “established principle that ‘[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . .’”) (citation omitted); *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990); *Finley v. United States*, 490 U.S. 545, 554 (1989); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).
  10. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) (discussing the use of clear statement rules to enforce the separation of powers and federalism, generally); *The Supreme Court 2003 Term: Leading Cases: II. Federal Jurisdiction and Procedure*, 118 HARV. L. REV. 386, 391 (2004) (discussing the separation of powers and federalism rationales for the Court's narrow interpretations of federal jurisdiction).
  11. The argument here builds on a previous article, *The Checks and Balances of Forum Shopping*. That article argued that because our jurisdictional system exploits forum shopping to constrain federal courts, separation of powers norms that shape the interpretation of jurisdictional statutes should also shape the interpretation of procedures that limit plaintiffs' forum choices. As I noted at the end of that article, the framework sketched there also opens the door for thinking about rules allocating claim-control rights through a separation of powers lens—an idea that this article turns to develop in detail. See Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107, 166 (2012).

tonomy.<sup>12</sup> This though raises a puzzle. Due process does not protect any interest absolutely. Its protections, rather, fall away in the face of strong competing interests. But, if litigant autonomy is protected only through the Due Process Clause, why is the Supreme Court, in the course of construing Rule 23, so unwilling to override litigants' autonomy interests when the balance of interests actually favors aggregation?<sup>13</sup>

By redirecting our attention to autonomy's role in our jurisdictional system, the argument offers a way to defend the Court's treatment of autonomy by lending it a different formal underpinning. When due process protection for autonomy gives out, institutional values—federalism and separation of powers—still obligate courts to construe rules derogating from the policy of litigant autonomy narrowly. The Court's treatment of the class action rule—as a narrowly construed exception to the “usual rule that litigation is conducted by and on behalf of the individual named parties only”<sup>14</sup>—pretty neatly maps onto this idea.

The argument here also draws out an important tension between two conservative criticisms of mass tort litigation. On the one hand, legal conservatives tend to exhibit near-reflexive hostility to supposedly “plaintiff-friendly” state courts.<sup>15</sup> On the other hand, conservatives are also famously hostile to federal class actions.<sup>16</sup>

My argument puts these impulses on a collision course. Building a formal underpinning for contemporary class action law's treatment of

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12. For a representative sample of a vast literature, see, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007); Robert H. Transgrud, *Mass Trials in Mass Torts Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347 (1988); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599 (2015).

13. See, e.g., Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1110 (2012) (noting that arguments that “emphasize the importance of litigant autonomy have seldom considered how it should be balanced against other important interests. Instead, they have insisted that litigant autonomy is inviolable no matter what”).

14. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

15. Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 310 (2014) (noting that the Court's conservative justices tend to exhibit pronounced suspicion of supposedly “plaintiff-friendly” state courts).

16. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1604 (2014) (noting conservatives' “hostility to class actions and the lawyers who bring them”).

autonomy, it turns out, requires acknowledging states' continuing role in our system of mass tort federalism.

I develop the argument in two parts. Part II reviews existing accounts of litigant autonomy, showing how none offer an adequate defense of current class action law's nearly "absolute" protection of that value.

Part III then sketches the Article's new way of thinking about litigant autonomy, in four steps: Section A unpacks how litigant autonomy protects states and how class actions, by overriding that autonomy, aggrandize federal courts. Section B introduces the basic separation-of-powers argument for a narrow interpretation of Rule 23 that flows from the federalism problem with class actions.

Section C responds to one likely objection—that the argument misapplies a "narrow construction" rule developed for jurisdictional law to a nonjurisdictional rule, the federal class action. I show that, to the contrary, doing so is actually consistent with existing doctrine: The scheme of limited federal jurisdiction is a product of the complex interplay of rules both "jurisdictional," in a technical sense, and nonjurisdictional. And the Court applies the "narrow construction" rule to both, making the approach argued for here a natural, even inevitable, extension of existing case law.

Section D responds to some additional objections, including (1) that the delegation of rulemaking authority to federal courts obviates separation of powers concerns with broad judicial constructions of the class device and (2) that the argument here is inconsistent with the Class Action Fairness Act.

## II. THE NEED FOR A NEW THEORY OF LITIGANT AUTONOMY

Before introducing this Article's new theory of litigant autonomy, this Part reviews predecessors. It focuses, in particular, on how these predecessor theories can't convincingly explain the Court's tendency to afford litigant autonomy near absolute protection. The end of this Part also explores the latest attempt to justify the Court's approach to autonomy. This attempt shifts focus in a way that anticipates the shift developed in this Article: away from due process and toward separation of powers norms. This latest theory ultimately falls short of justifying what the Court does, but it provides a nice bridge to the new theory proposed here.

Before turning to explain what's come before, though, this Part starts by clarifying some terminology.

### A. Some Terminology

Talking clearly about litigants' claim-control, or "autonomy" rights, requires nailing down terminology used in the rest of this Article. Below, mostly for purposes of economy, this Article will use the term "standing" to refer to the right to control a claim. As Richard Nagareda cautions, using the term "standing" is "admittedly risky, as any mention of the word . . . in legal conversation has a tendency to invoke the heavily freighted meaning of that term in constitutional and administrative law."<sup>17</sup> I use it here, following Nagareda, in the sense that civil-recourse theorists sometimes use the term: to mean principles that particularize who is vested with control over enforcement of a claim and therefore who "among all people in the world" may "invoke the coercive powers of the civil justice system" to "demand a legal response" from the defendant.<sup>18</sup> To distinguish it from the specialized body of rules that courts have extracted from the Article III case-and-controversy requirement, like the injury-in-fact requirement, I will refer to standing in this non-Article III sense as "standing," while reserving the term "Article III standing" for case-or-controversy-derived rules.

A certain conception of claim-control, or standing, is built in to the way we ordinarily talk about rights of action and remedies, with the result that our everyday descriptions of causes of action risk confusing us about the relationship between a right of action, remedies, and standing in a way that loads the dice in favor some preexisting accounts of litigant autonomy. Rights of action, we say, belong to someone. If you have a right of action, it is *your* right of action, meaning you—its owner—are the one who controls whether and where to assert it. By describing rights of action in this way, our language biases us in favor of a conception of private law standing as a type of ownership right, one that vests in the persons who are entitled to, or "own," "individual" remedies. But, in fact, our descriptions haven't kept up with the way rights of action actually work or the way that standing to enforce a right of action, in practice, actually vests today.

Thinking clearly about claim-control, or standing, therefore requires carefully breaking down the concept of a "claim" into its constituent parts. A "claim" describes several interlocking concepts. One is the protected interest that the right to relief protects—what might be termed the "primary right." The second is the right to a remedy that corrects an infringement of that interest, or the "remedial right." The

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17. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1117 (2010).

18. *Id.* Nagareda also notes the parallel between the use of the term and its use in the literature on civil-recourse theory. *Id.* at 1112 n.30.



third is the right to sue to obtain the remedy from the defendant—which I will call the “right of action” or “claim.”

The claim or right of action in turn can be broken down further into two different components. The first is whether the right of action is public, meaning enforced by public officials (e.g., attorneys general or agencies) or private, meaning subject to privatized enforcement. With respect to private claims, the second component is who, exactly, among the broad class of persons in the private sphere is vested with enforcement power, which I will call the claim-control right or standing.

The right to a remedy and the right to control enforcement of the claim for that remedy, or standing, can but need not travel together.<sup>19</sup> Indeed, as the next section discusses, the trend in modern law has been to unbundle the right to relief and the right to control enforcement of a claim for that relief, allowing each to vest in different persons.

## B. The Litigant Autonomy Conundrum

Class actions are routinely described as an exception to the “usual rule” that litigation is conducted “by and on behalf of the individual named parties only.”<sup>20</sup> The Supreme Court, in turn, has increasingly interpreted the Rule creating this exception, Rule 23 of the Federal Rules of Civil Procedure, narrowly—by which I mean the Court has adopted the least hospitable tests for certification consistent with the Rule’s language and legislative history.

For example, in *Ortiz v. Fibreboard Corp.*<sup>21</sup> and *Wal-Mart Stores, Inc. v. Dukes*,<sup>22</sup> the Court narrowed the potential reach of Rule 23’s mandatory, or non-opt-out, provisions. *Ortiz* confined Rule 23(b)(1)(B), despite its notoriously open-ended language, to cases that fit features of the representative actions against limited funds entertained in equity.<sup>23</sup> And then in *Wal-Mart Stores*, the Court confined Rule 23(b)(2) to claims seeking injunctive relief for systemic wrongs and other similarly “indivisible” remedies.<sup>24</sup> Outside those contexts, class members must be afforded a right to opt out of the class action.

But federal courts’ narrowing constructions of Rule 23 do not extend just to the Rule’s controversial mandatory provisions. Increas-

19. *Id.* at 1117 (“[C]ivil law need not necessarily define the scope of the right of action in a manner that synchronizes with either the wrong or the remedy.”).

20. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

21. 527 U.S. 815 (1999).

22. 564 U.S. 338, 360 (2011).

23. *See Ortiz*, 527 U.S. at 841 (discussing the history of the principle favoring equal treatment of claim owners in nineteenth century equitable limited fund precedents).

24. *See Wal-Mart Stores, Inc.*, 564 U.S. at 360.

ingly, the Court's construction of the federal class action rule has made it difficult to certify claims for class actions at all, opt-out rights or no.<sup>25</sup> Rule 23, in effect, is interpreted narrowly writ large. And the Court's decisions justify interpreting Rule 23 in this stinting way because this respects the "usual rule" of litigant autonomy—that is, the usual rule that injured parties have the right to control the enforcement, presentation, and disposition of their own claims.<sup>26</sup>

Why, though, litigant autonomy is such an important value remains deeply untheorized in the Court's cases.<sup>27</sup> I am interested in a particular puzzle, noted by others, which current theory has been unable to adequately address. Call it the "anti-balancing" puzzle.

Due process is often invoked as the source of protection for litigant autonomy. This though raises the puzzle this Article sets out to solve. Due process does not protect any interest absolutely. Due process protections fall away when competing interests outweigh the protected interests that due process is concerned with. But, if autonomy is protected only through the due process clause, why should courts, in the course of construing Rule 23, be so unwilling to override litigants' autonomy interests when other competing interests that favor aggregation weigh more heavily in the balance?

Below I explore this problem and scholars' attempts to deal with it. The failure of these attempted solutions animates this Article, which attempts to come up with a more convincing answer to the anti-balancing puzzle.

### 1. *The Anti-Balancing Puzzle*

In the nineteenth century, there was no need to balance competing interests when deciding whether someone got to control a claim. Standing principles just *were*: They were a product of the "general law," or the common law of remedies.<sup>28</sup> The general law derived

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25. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); Glover, *supra* note 1, at 2 & n.1 (collecting cases and authorities and asking whether the limitations increasingly imposed by the courts portend "the end of the [class action] world as we have known it").

26. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

27. The Court's due process pronouncements in the class context are notoriously minimalist. See, e.g., *Wal-Mart Stores, Inc.*, 564 U.S. at 363 (noting, without additional comment, the "serious possibility" that due process requires notice and opt out in (b)(2) actions that include claims for monetary relief).

28. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 692–93 (2004) (noting that nineteenth-century courts treated the traditional principles of private law standing and proper parties as part of the "general law" that had been constitutionalized, to some degree, by Article III); Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 742–51 (2013) [hereinafter Nelson, *Unwritten Law*] (noting that enforcement details of private rights of action, to the extent not specified by applicable state or federal statutes, were filled

standing principles from the status of a right holder as the “owner” of a right to a remedy.<sup>29</sup> Consistent with this property-like conception of

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in by the general law). Like other principles of the general law, the traditional standing principles of the period were subject to exceptions in equity and, in federal court, also could be altered by federal statutes or (via, e.g., the Process and, later, Conformity Acts) state law. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196; Act of September 29, 1879, ch. 21, 1 Stat. 93.

29. Blackstone classified “choses in action” or “things in action” as “property,” but narrowly confined the term to suits sounding in debt or contract. By contrast, he characterized tort damages as “property” that is first “acquired” *through* a successful lawsuit. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 436 (1768) (distinguishing between “property, the right of which is before vested in the party, and of which only possession is recovered by suit or action,” which included debts and contractual rights, and “property, to which before a man had no determinate title or certain claim, but he gains as well as the . . . possession by the process and judgment of the law,” which included penalties and damages for torts and other personal wrongs). *See id.* at 396–97 (reserving the term “thing in action” or “chose in action” for rights to sue derivable from debt or contract); *see also* Joseph Story, *Natural Law*, in JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA 128 (Valerie L. Horwitz ed., 2006) (1844) (distinguishing between property in things and property in “actions,” meaning contractual performance).

Other English authorities of the period defined the “thing in action” in a wider sense, to include unliquidated actions for tort damages. *See, e.g.*, JOHN RASTELL & WILLIAM RASTELL, TERMES DE LA LEY 62–63 (John More ed., London Assignes of John More 1636) (defining “things in action” to include not only actions for debt and breach of contract, but also tort actions, e.g. for damages resulting from “beatings”); GILES JACOB, A NEW LAW DICTIONARY 125 (3d ed. 1736) (“[G]enerally all [c]auses of [s]uit for any [d]ebt, [d]uty or [w]rong are to be accounted [c]hoses in [a]ction.”); W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 1010 (1920) (tracing, although critically, the expansion of the concept of “choses of action” to eventually include, by the eighteenth century, “all rights of action, whether enforceable by real or personal actions,” as well as the parallel growth of the term’s association with “personal property”); T.C. Williams, *Is a Right of Action in Tort a Chose in Action?*, 10 L.Q. REV. 143 (1894) (criticizing Blackstone’s definition and noting that both “ancient” and nineteenth century sources defined “chose in action” to embrace tort actions).

In the nineteenth century, American legal thinkers, courts, and legislatures eventually gravitated toward the broader conception of the term. *See, e.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 285 (1827) (classifying “things in action” as a form of personal property, and defining the term to include all “personal rights not reduced to possession, but recoverable by suit at law” including “damages . . . for torts”); *Ezell v. Dodson*, 60 Tex. 331, 332 (1883) (“The right to sue for damages in tort is a chose in action, and property within the legal sense of that term.”); *Chicago, Burlington & Quincy R. R. Co. v. Dunn*, 52 Ill. 260, 264 (1869) (citing JAMES KENT, *supra*) (“A right to sue for an injury, is a right of action—it is a thing in action, and is property, according to this authority.”); *Gillet v. Fairchild*, 4 Denio 80, 82 (N.Y. Sup. Ct. 1847) (citing JAMES KENT, *supra*) (criticizing Blackstone and stating the better view is that a chose in action “includes all rights to personal property not in possession which may be enforced by action” and noting “it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, express or implied. In both cases, the debt or damages of the owner is a ‘thing in action.’”).

remedies, the law of proper parties identified, although with exceptions, the party in interest entitled to the remedy as the only person with standing to enforce the claim.<sup>30</sup>

The idea that the “owner” of the right controlled its enforcement tracked the then-dominant conception of property, which viewed the right to exclusive use as the core feature of property.<sup>31</sup> The enforcement right, on this view, was akin to a use right. And the law of proper parties of the period, by generally assigning control over enforcement to the “owner” of the remedy sought, simply recognized the “owner’s” sole and exclusive dominion over its use.<sup>32</sup>

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John McGinnis argues that the American tendency to equate civil rights writ large with property predated the nineteenth century. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64 (1996) (“[A]t the time of the Framing it was widely agreed that men’s liberty and property rights were one and the same.”).

30. See Woolhandler & Nelson, *supra* note 28, passim (reviewing eighteenth and nineteenth century authorities evidencing an understanding that private rights were, as a matter of at least the “general law” and to a degree constitutional law, under the control of an injured party who claims a right to the remedy sought); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 283 (1990) (noting that the principle that enforcement of personal rights was generally controlled by their owners “runs through the opinions and commentary from the late eighteenth to at least the middle of the twentieth century”). For one authoritative statement of the principle, see John Marshall, Representative John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston* (March 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984), *quoted in* Woolhandler & Nelson, *supra*, at 697 (“A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. . .”).
31. See *Wynehamer v. People*, 13 N.Y. 378, 433 (1856) (“Property is the right of any person to possess, use, enjoy and dispose of a thing.”); *Jones v. Vanzandt*, 13 F. Cas. 1054, 1055 (D. Ohio 1849) (“Property is the exclusive right of possessing, enjoying and disposing of a thing which is in itself valuable.”); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 138 (property is an “absolute right” that “consists in the free use, enjoyment, and disposal of all his acquisitions . . .”); see also Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1998) (noting that the right to exclude—to “sole and despotic dominion” over a thing—has traditionally been thought the essence of a property right); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 389 (2003) (explaining that the traditional concept of property was an “exclusive,” “integrated” right to “acquire, use, and dispose of one’s possessions”).
32. These standing principles had their origins in a very different theory—that delictual and contractual rights of action were “personal” to the plaintiff. See Holdsworth, *supra* note 29, at 1001; Bone, *supra* note 30, at 257–84. Once private rights of action came to be viewed as akin to personal property, though, nineteenth-century American courts and legislatures drew on the idea that in personam rights are forms of property, as well as their “personal” status, to explain who ought to control the enforcement of a claim, a relationship that played a particularly important role in nineteenth-century coverture reform. See, e.g., *Dunn*, 52 Ill. at 264–66 (reasoning, in a case involving the scope of coverture disa-

When *Erie* ended the era of federal common law, though, it destroyed the formal underpinning for federal standing principles, leaving lawyers to find new ways to ground the allocation of claim-control rights. The process of reconceptualization went in different directions. One strand built on the legal realists' pre-*Erie* deconstruction of the "property-like" concept of a claim.

"Our ideas of right," Ernst Freund had written in 1897, "have developed from its most common form," in which "control [of the right]" and the "interest [protected by it]" vest in the "same person."<sup>33</sup> The association of rights with personal property had led, Freund argued, to the misimpression that giving owners of a right to relief control of its enforcement was part of the natural order of things.<sup>34</sup>

But exceptions were legion. And these exceptions, wrote Freund, ought to force us to rethink the idea that "control" of a right and "ownership" of it vest in the same person.<sup>35</sup> Rights, he said, are simply

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bilities, that the right to control and dispose of a right of action in tort, considered as "property," lies with its "natural owner," the person entitled to the remedy, while simultaneously invoking its status as a "personal right" in support of the same conclusion).

By describing control over rights of action in property-like terms, nineteenth-century lawyers implicitly cast the claim-control principles of the period as part of the "make up" of rights of action sounding in contract and tort. See ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* 15, 48 (1897) (noting that the nineteenth century conception of individual rights, by building on an analogy to property rights, viewed the "element of control" as a "constituent factor" of the "right"); see also Mossoff, *supra* note 31, at 389 (noting that property law of the period viewed property as an "integrated" right to "acquire, use, and dispose of one's possessions").

Because property was, at the time, a core natural law concept, the analogy between property and rights of action also captured a prevailing sense that the right to control claims was an important type of "natural" liberty—the freedom to determine the best use of one's own rights. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1586 (2003) (discussing property's status in the nineteenth century as a natural right). For recent discussions of the relationship between litigants' control over the enforcement of their rights and pre-Founding natural law theory, see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 544 (2005) (discussing Locke's theory that people possess a natural right to self-help for the redress of wrongs, for which the state is obligated to provide effective substitutes, in the form of rights of action); Woolhandler & Nelson, *supra* note 28, at 696–97 (noting that John Locke believed that while "everybody in the state of nature enjoyed the right of punishment (because 'in the state of nature every one has the executive power of the law of nature'), . . . 'the [right] of taking reparation . . . belongs only to the injured party.'" (quoting JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 11, 13 (6th ed. 1764), reprinted in *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (J.W. Gough ed., Macmillan Co. 1946))).

33. FREUND, *supra* note 32, at 48.

34. *Id.*

35. *Id.* at 16–25.

protected interests.<sup>36</sup> Control over enforcing a right shifts or varies based on a pragmatic calculation about what works best in light of the varying “conditions under which . . . protection [of that interest] must operate.”<sup>37</sup> That calculus suggested that control of a right, in turn, ought to vest in a “representative” of a group of right holders when doing so would further their underlying “joint interests” in the collective use of their rights.

Freund’s deconstruction of the claim, in effect, cast control of claim as a procedure afforded to protect litigants’ underlying substantive interests. This idea eventually was incorporated into one standard constitutional theory for protecting litigant autonomy—what I will call, below, the procedural due process theory.

Like Freund, orthodox procedural due process theory distinguishes between the substantively protected right to relief and control of the claim for that relief. The right to relief is the constitutional “property,” or entitlement, to which due process protection attaches.<sup>38</sup> Giving litigants an opportunity to exercise control over the enforcement of that right is, by contrast, a procedural protection owed litigants before a final judgment “deprives” them of their remedial right.<sup>39</sup> Why, ex-

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36. *Id.* at 15.

37. *Id.* at 15–16, 48.

38. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (characterizing the “right to redress” as constitutional property); *see also* Campos, *supra* note 13, at 1092–97 (advancing an expansive version of this idea that embraces not only right to redress but also the underlying primary right to be free from the wrongful conduct as the relevant “property interests”); Weber, *supra* note 12, at 389 (advancing a procedural due process account of opt-out rights based partly on an assumption that the “property interest at stake” is the “relief that the class member is lawfully entitled to”).

39. This view finds some support in *Logan*, 455 U.S. 422. *Logan* held that a state agency violated the due process rights of the respondent when it invoked the agency’s inadvertent failure to schedule a conference on time as grounds for terminating a claim for injunctive relief. In the process, it defined constitutional property as a positive entitlement that can only be terminated “for cause,” and held that a “cause of action” qualified as such. *Id.* at 430–31. On one interpretation, *Logan* meant that the “remedial right” (in the sense discussed in section II.A) was the constitutionally protected property, and the claim or right to sue to vindicate the remedial interest was the procedure that must be provided to protect it. *See* Weber, *supra* note 12, at 389; *see also* *Logan*, 455 U.S. at 431 (characterizing the constitutional property as the “right to redress,” which “is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a ‘for cause’ standard, based upon the substantiality of the evidence”). This, though, is not the only possible interpretation of *Logan*—a more recent theory, which I explore below, invokes the case, too, on the theory the Court meant that the claim or right to sue for a remedy was itself the protected “entitlement,” rather than a procedure offered to protect that entitlement. *See infra* note 71 and accompanying text; *see also* Weber, *supra* note 12, at 389–90 (noting the case could be read to treat the “right to use the judicial system” as the protected interest, and offering an alternative account of opt-out rights on this basis); Redish & Larsen, *supra* note 12, at 1589 n. 61, 1597 (citing Weber, *supra* note 12) (sug-

actly, the opportunity to control one's own claim is usually required is a question with a rich history. But at a minimum, giving litigants an opportunity to take control of their claims is often portrayed as an antidote to agency problems with representation—it gives litigants a prophylactic mechanism through which they can protect themselves from bad or conflicted representation of their interests.<sup>40</sup> (The idea parallels Albert O. Hirschman's famous argument that the right to

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gesting that class members bring with them “pristine pre-procedural substantive rights” to control their own claims).

Over time, new advocates of the theory have offered refinements of the orthodox procedural due process account. In a recent reformulation, for example, Sergio Campos argues that the primary right, or right to be free from wrongful conduct, should be considered the constitutional property, and the right of action the procedure “due” to protect it. Campos, *supra* note 13, at 1092–97; *see also* Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1599–1607 (2012) [hereinafter Campos, *Enforcement Defaults*] (defending the idea that, for *Erie* purposes, the right to be free from wrongful conduct is a protected substantive right, and characterizing the enforcement right as a procedure that protects that interest); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 989 (2000) (noting that, *Logan* notwithstanding, the Court's cases might make more sense if they focused “on the underlying interest that the cause of action seeks to vindicate” as the constitutionally protected “property interest”).

40. Coffee, *supra* note 12, at 417–27 (defending opt-out rights as a procedural safeguard for class members' remedial interests); *id.* at 376 (analyzing opt-out rights and intervention as procedures that mitigate agency problems in representative litigation); Weber, *supra* note 12, at 400–12 (defending opt-out rights, in part, as a safeguard for class members' remedial interests); *see also* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (identifying mitigation of agency problems as one of the rationales for opt-out rights).

Robert Bone notes that the approach, which he calls an “outcome-based” due process account, is “quite popular in the literature on representation.” Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 582 (2011). A different way of understanding the conventional procedural due process approach is that opt-out safeguards more than one protected interest—for example, a property interest in adequate relief and a participation, or “day in court,” interest. *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that the day in court entitlement boils down to a participation interest); Bone, *supra*, at 590–92 (noting procedural protections can be viewed, slightly more expansively, as simultaneously safeguarding both adequate representation, participation, and consent interests). On this view, balancing would need to consider both interests, yet might favor replacing exit rights with voice rights when exit rights on balance disserve class members' remedial interests and adequate procedures, in the form of “voice” or intervention rights coupled with procedures ensuring adequate representation, suffice to protect the participation interest. *See* Campos, *supra* note 13, at 1111–12; *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–320 (2004) (arguing that balancing cost and accuracy are relevant to due process, but subject to a side constraint that requires some minimum set of adequate procedures that ensure class members have a right to participate in the proceeding affecting them so far as is practicable).

exit a representative relationship can help correct agency problems endemic to representation.)<sup>41</sup>

By treating the right to take control of a right of action as a “procedure” that helps protect a plaintiff’s right to a remedy, the theory marks out claim-control as a matter under federal judicial control (by virtue of the judiciary’s historic control over matters of procedure and the Rules Enabling Act’s delegation of rulemaking authority to federal courts).<sup>42</sup>

It also suggests there’s no inherent due process problem with a class action brought by an adequate representative of class members’ interests, so long as class members are generally given an opportunity to take control of their own claims (something afforded through Rule 23’s default “opt out” procedure).<sup>43</sup> But just as crucially, it also suggests that the judicial system has quite a bit of flexibility to restrict litigants’ power to control their claims, depending on how the pragmatic balancing factors laid out in *Mathews v. Eldridge*<sup>44</sup> and *Connecticut v. Doe*<sup>45</sup> play out.

When considering whether due process requires the provision of a given procedure, *Mathews* and *Doe* direct courts to weigh the interest of the party seeking the procedure’s protection, the risk of error if that protection is withheld, the competing interests of the private parties advocating withholding it, and any governmental interests that would be furthered by jettisoning it.<sup>46</sup> When a procedure doesn’t on balance further the interests it supposedly protects, or competing private interests and state concerns outweigh those interests, the procedure can be scrapped.

So it is, the theory would seem to suggest, for the opportunity to control a claim. Although, as a default matter, class members should get a chance to control their claims, that opportunity can be jettisoned if competing interests outweigh the benefits of claim-control opportunities for class members.<sup>47</sup>

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41. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 120–26 (1970); see also Coffee, *supra* note 12, at 399–435 (analyzing protections for class members using Hirschman’s terminology).

42. See, e.g., 28 U.S.C. § 2072 (2012); *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (noting there are “matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power” (citation omitted)).

43. FED. R. CIV. P. 23(c)(2)(B)(v).

44. 424 U.S. 319 (1976).

45. 501 U.S. 1 (1991).

46. *Id.* at 11.

47. See Weber, *supra* note 12, at 391 (noting that defending opt-out rights according to the usual procedural due process framework requires subjecting claim-control to the *Mathews* balancing factors); Campos, *supra* note 13, at 1111–12 (critiquing existing accounts’ failure to balance litigants’ autonomy interests against other competing interests, and noting this is inconsistent with both the treatment of



Yet, therein lies the puzzle—what I call the anti-balancing problem. The problem has been noted before, most notably by Sergio Campos. When deciding how broadly or narrowly to interpret Rule 23, federal courts seem, notes Campos, to afford litigant autonomy near “absolute” protection.<sup>48</sup> That seems like an overstatement—federal courts do certify class actions, after all. But he’s right. The Court’s decisions have largely limited the availability of the class action to contexts, like limited funds, indivisible remedies, and negative-value claims, where autonomy simply is of no, or limited, value to class members. In contexts where autonomy is plausibly of some value, the Court has cited it as a reason to read Rule 23 in a stinting way that makes it very hard to certify a class.<sup>49</sup>

Professor Campos uses the example of mass torts to illustrate the problem. Mass tort claimants, he notes, are at a disadvantage because a mass tort involves asymmetry between the stakes for each plaintiff and the defendant. Mass tort plaintiffs price their claims based on their individual injuries, and invest in their suits accordingly. The defendant, by contrast, makes investments based on the aggregate liability risks generated by the entire mass tort. Moreover, the defendant’s investment in developing defenses to one claim can be amortized across each other claim with respect to duplicative questions of law and fact.<sup>50</sup> For both reasons, defendants have incentives to invest much more in defending against any individual mass tort

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other protected interests under *Mathews* and *Doehr* and with the compelling interest exception to substantive due process).

48. See, e.g., Campos, *supra* note 13, at 1110 (“Those who emphasize the importance of litigant autonomy have seldom considered how it should be balanced against other important interests. Instead, they have insisted that litigant autonomy is inviolable no matter what.”); *id.* at 1115 (noting that protecting litigant autonomy “absolutely” is inconsistent with the “balancing test outlined in *Mathews v. Eldridge*”); *id.* at 1104–10, 1115–17 (arguing that appropriately balancing class members’ interests must confront the tension between class members’ autonomy, their remedial interests, and the deterrent goals of the substantive law). See also Bone, *supra* note 40, at 583 (noting this “mismatch between theory and existing nonparty preclusion doctrine”).
49. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).
50. The argument was originally developed at length by David Rosenberg. See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002). Sergio Campos provides a nice overview of the argument in his article *Mass Torts and Due Process*, *supra* note 13, at 1076 (discussing the problem of “asymmetric stakes” in a mass tort, and explaining that it stems from the fact that “a defendant owns all of the potential liability associated with any common issue, but each plaintiff only owns a portion of the recovery (the flipside of liability) . . . . The defendant simply has more at stake.”). The summary of both articles here is drawn partly from my prior article, *The Checks and Balances of Forum Shopping*, *supra* note 11, at 154–57.

claim than any individual litigant does in enforcing it.<sup>51</sup> The predictable results include sub-par recoveries for individual class members, less deterrence, and, critics argue, “more mass torts.”<sup>52</sup>

As a result, class members—and the public—would be better off if they pooled their claims together and authorized a single lawyer, acting on a contingency basis, to enforce their claims as a unit. Doing so ensures that the lawyer will, like the defendant, invest in enforcing the claims based on their aggregate value.<sup>53</sup> The hitch, of course, is that it is impossible for widely dispersed class members to agree to transfer control of their claims as a unit to a single representative. Enter the class action—it mimics the deal that rational class members would cut if they could.

Campos, indeed, favors certifying mass torts as mandatory class actions in order to cut off reverse auctions (in which defendants leverage latent conflicts between class representatives and class members in simultaneously pending classes), while also maximizing plaintiff-side scale economies.<sup>54</sup> But, the Court has instead strictly limited Rule 23(b)(1)(B)’s mandatory class provisions to mass actions against a limited fund and imposed restrictive conditions on limited-fund class actions that all but exclude mass torts from (b)(1)(B)’s reach.<sup>55</sup> And, in *Amchem v. Windsor*, it notoriously went even further—laying down ground rules that effectively preclude the certification of most marketable mass tort claims as opt-out class actions.<sup>56</sup>

*Ortiz v. Fibreboard Corp.*, the decision that limited 23(b)(1)(B) to limited fund contexts, seeks to justify this stinting approach to class certification, in part, by invoking due process based concerns about

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51. See Campos, *supra* note 13, at 1076 (given these asymmetries, “the defendant can exploit economies of scale in investing in common issues that the plaintiffs cannot,” including in “legal research, discovery and other factual investigation, and the hiring of expert witnesses and other consultants”).

52. *Id.* at 1087 (as a result of asymmetric stakes, “individual control of the claim results in the [plaintiffs] ‘shooting [themselves] in the collective foot’ by causing more mass torts”).

53. *Id.* at 1077 (“[C]lass counsel is given a stake that is consistent with having an entire stake in the liability. If class counsel invests in the litigation to increase the net amount of the entire pie, her cut of that pie commensurably increases.”).

54. Campos, *supra* note 13, at 1101–03 (arguing explicitly for a broad reading of Rule 23(b)(1)(B)); see also Rosenberg, *supra* note 50, at 834 (“[T]o exploit litigation scale economies fully, courts should automatically and immediately aggregate all potential and actual claims arising from mass tort events into a single mandatory-litigation class action, allowing no class member to exit.”); *id.* at 855 n.51 (arguing his theory “generally explains” the mandatory class provisions of Rule 23(b)(1)).

55. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see also Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2009 SUP. CT. REV. 183, 206 (discussing the Court’s narrow understanding of Rule 23(b)(1)(B)).

56. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

the way that class action “collectivism” overrides litigant autonomy.<sup>57</sup> But the problems with mass torts outlined above undermine this justification for its holding. If litigants’ control of their own tort claims in a mass tort context actually tends, on balance, to harm those litigants’ remedial interests, then *Mathews* and *Doehr* suggest that affording class members control over their claims isn’t required. These cases’ balancing factors, after all, do not demand giving litigants control of their claims if that control actually, on balance, disservices their interests.<sup>58</sup> Yet, neither *Ortiz* nor *Amchem* considered these problems. Indeed, neither case stopped to engage in *any* balancing of the benefits of autonomy and its costs that due process would seem to demand. Instead, the Court invoked autonomy in each case in the service of a simple dogmatic through-line—mass torts generally shouldn’t be amenable to certification, because litigant autonomy is paramount.

This is just one example of a feature that is characteristic of the Court’s class action cases. When the Court finds class members are actually capable of independently litigating their own claims to a successful resolution, autonomy gets invoked as a strong thumb on the scale against class certification, regardless of how other interests weigh in the balance. This doesn’t look at all like the kind of analysis procedural-due process theory prescribes.

## 2. *Solutions to the Puzzle?*

Can the Court’s attitude toward autonomy be justified? Some other accounts have leapt into the gap in an effort to offer that attitude a coherent formal underpinning.

### a. *Litigant Autonomy as a Fundamental Right*

One common attempt at a solution draws on a theory of litigant autonomy that’s been around since at least the 1970s. This competitor

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57. *Ortiz*, 527 U.S. at 848 (“[B]efore an absent class member’s right of action was extinguishable due process required that the member ‘receive notice plus an opportunity to be heard and participate in the litigation,’ and we said that ‘at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.’”) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). By treating the opt-out right as something that must precede a “deprivation” of a right to redress through preclusion, *Ortiz* equates it with a protection due to litigants’ property interests in redress and so, in this passage, at least, seems to draw on the conceptual apparatus of procedural due process.

58. See, e.g., Campos, *supra* note 13, at 1110 (“Those who emphasize the importance of litigant autonomy have seldom considered how it should be balanced against other important interests. Instead, they have insisted that litigant autonomy is inviolable no matter what.”); *id.* at 1115 (noting that protecting litigant autonomy “absolutely” is inconsistent with the “balancing test outlined in *Mathews v. Eldridge*”); *id.* at 1104–10, 1115–17 (arguing that appropriately balancing class members’ interests must confront the conflict identified by David Rosenberg between class members’ autonomy and the deterrent goals of substantive law).

account contends that litigant autonomy is a kind of fundamental interest, marking it out for a particularly strong degree of due process protection. Many authors have advanced this type of “substantive due process”-esque or “fundamental rights” argument in different forms over the years, including Robert Transgrud in the 1980s, Henry Monaghan in the 1990s, and (with some important caveats and refinements) Martin Redish today.<sup>59</sup> And the Court has occasionally

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59. See Transgrud, *supra* note 12, at 74 (appealing to “our tradition of individual claim autonomy in substantial tort cases,” rooted in a “natural law notion that this is an important personal right of the individual”); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1174 (1998) (advocating recognition of a “substantive due process” right to opt out of a class action, in recognition of “our long-standing tradition of individual litigant autonomy”).

Martin Redish departs from Transgrud and Monaghan by framing his defense of litigant autonomy as one that draws on “procedural” rather than substantive due process; his “procedural” account invokes fundamental process-based values (e.g., democratic legitimacy) rather than individual liberty interests. See Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1890 (2009); Redish & Larsen, *supra* note 12, at 1581–86. Even so, Redish’s arguments, like the older substantive due process-based theories, share a commitment to the idea that litigant autonomy is a normatively important value, independent of instrumental considerations. See *id.* at 1581–84 (arguing autonomy reflects a “foundational” constitutional value of “self-determination” whose normative claims are analytically separate from “pragmatic interests” in cost, efficiency, or outcome accuracy).

Other theorists have advocated theories of autonomy that occupy a kind of half-way point between the flexible pragmatic account and the much less flexible fundamental rights theory. Jay Tidmarsh advocates autonomy from a contractarian perspective, which advocates limiting the class action to cases in which “the representation makes class members no worse off than they would have been if they had engaged in individual litigation.” Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1139 (2009). Although Professor Tidmarsh is agnostic about the effect of his test on certification were it adopted, *id.* at 1202, his approach combines a flexibility characteristic of the pragmatic theories with an unwillingness to weigh class members’ interests against the public interest that is also characteristic of the fundamental-rights-type theories. *Id.* at 1183 n.198 (noting that his approach, while sharing *Mathews*’ characteristic flexibility, is “not the constitutional minimum that *Mathews v. Eldridge* might tolerate”). Robert Bone, in addition, also advocates a “process-based” account of litigant autonomy (by which he means an account rooted in non-instrumental concerns for “fair process” as opposed to instrumental “outcome-based” concerns) that also occupies a kind of halfway point between the orthodox procedural due process account and fundamental rights accounts. Bone, *supra* note 40, at 585. Bone rejects the orthodox procedural due process account’s treatment of claim-control rights in instrumental terms—as a procedure that protects against outcome error attributable to agency costs—and also rejects its willingness to subject claim-control rights to blunt utilitarian cost-benefit balancing. *Id.* at 582–84 (critiquing outcome-oriented balancing approaches to litigant autonomy). But he nonetheless argues “procedural due process” requires only those control opportunities consistent with institutional considerations bearing on the larger fairness of the judicial process, including “convenience, prejudice, judicial economy, and

gestured to it too.<sup>60</sup>

The idea isn't implausible. The power to control one's own claims secures, as Eugene Kontorovich puts it, right-bearers' "ability to individually determine the best use of their rights" by deciding whether to assert the right or alienate it.<sup>61</sup> Even Ernst Freund, the great original critic of the ownership model of remedies, acknowledged its normative appeal: The power to control ones' rights is "the power and liberty of choosing between different interests," which, he wrote, is "the highest of human interests."<sup>62</sup>

But the fundamental rights theory has several problems. Campos notes that "fundamental liberties typically must be 'deeply rooted in this Nation's history and tradition' and proponents of a 'long-standing tradition of individual claim autonomy' do not provide any historical support for it."<sup>63</sup> Moreover, even if there were sufficient historical support (and there may be), the idea goes against the grain of the modern Court's hostility to substantive due process-type theories. The Court has largely used history to brake further expansion of fundamental interests—not as a source for recognizing new ones.<sup>64</sup>

But the theory's chief problem is that it doesn't really escape the anti-balancing problem. Fundamental interests can be infringed for "compelling" reasons. Campos argues that some of the benefits of class actions—increasing access to justice, leveling the playing field with institutional defendants, enhancing deterrence of mass torts—plausibly qualify as compelling.<sup>65</sup> One can disagree with this. But at a minimum, the point remains that even if autonomy is treated as a fundamental right, courts still ought to at least engage in a balancing inquiry, albeit a more circumscribed one, when deciding the extent to

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manageability." *Id.* at 617 n.175, 606. He treats these considerations as qualifications of the right, rather than interests that must be balanced against it. *Id.*

60. See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (noting preclusion of representative parties "runs up against the 'deep-rooted historic tradition that everyone should have his own day in court'"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

61. Eugene Kontorovich, *What Standing is Good For*, 93 VA. L. REV. 1663, 1666 (2007).

62. FREUND, *supra* note 32, at 15–16.

63. Campos, *supra* note 13, at 1110–11.

64. See Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1545 (2008). The fact that recent advocates are unwilling to invoke "substantive due process" (see Redish & Katt, *supra* note 59, at 1890 (articulating a non-instrumental "procedural due process" argument for litigant autonomy that nonetheless shares some kinship with the fundamental rights theories discussed above)) or to develop objective conceptual bases for recognizing the right like contractarianism (see Tidmarsh, *supra* note 59, at 1139) evidences an intuition that the substantive due process-type approach does not really jibe with the conservative Court's judicial restraint-based priors.

65. Campos, *supra* note 13, at 1112–13 (suggesting even if autonomy is a "fundamental liberty," due process does not require its protection if it is "self-defeating").

which due process compels a constrained application of Rule 23.<sup>66</sup> Yet this is exactly what the Court doesn't do.

*b. Litigant Autonomy as a "Substantive Right"*

Perhaps in part in response to this problem, another more recent attempt to provide a theoretical underpinning for the Court's protection of litigant autonomy has sprung up over the past decade. It offers a nice twist on the fundamental rights theory. Rather than treat autonomy rights as something the Constitution guarantees litigants out of respect for their liberty or dignity, it characterizes those rights as a legislative creation motivated by *policymakers'* respect for those same values.

Lawmakers who create an in personam-style right to a remedy, the theory goes, also intend to vest claim owners with a property-like right to control the use, disposition, and enforcement of that right.<sup>67</sup> Be-

66. *Id.* at 1110.

67. As David Marcus notes, Nagareda uses the term "preexisting rights to sue" to refer to his conception of in personam actions as "property rights"; although he "does not explicitly define" that term, "his argument makes the phrase's meaning clear": he conceives of "rights to sue" as individualized rights that preexist procedure and are "vested as such in individuals as property." David Marcus, *Some Realism about Mass Torts*, 75 U. CHI. L. REV. 1949, 1978 (2008) (reviewing RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007)). See, e.g., Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 160–61 & 161 n.50 (2003) [hereinafter Nagareda, *Preexistence Principle*] (quoting George R. Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 286 (1996)) (characterizing rights to sue as a "property right" and noting that this implies the claim owner has the power to control the claim, since "[o]wnership of property is, in a sense, nothing more than the right to bring actions to enforce a claim to the property."). Others who have advanced a version of this property-like conception of the claim include George Rutherglen, Martin Redish, and Richard Epstein. See Rutherglen, *supra*, at 286 (analogizing claims to property and using the analogy to support the view that the right to control the claim is "substantive"); Redish & Larsen, *supra* note 12, at 1597 (suggesting that class members bring with them "pristine pre-procedural substantive rights" to control their own claims); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 283–86 [hereinafter Redish, *Democratic Difficulty*] (arguing that class actions transform preexisting substantive rights by turning individually controlled choses in action into private attorney general actions); RICHARD A. EPSTEIN, *CLASS ACTIONS: THE NEED FOR A HARD SECOND LOOK* 2 (2002), [http://www.manhattan-institute.org/pdf/cjr\\_04.pdf](http://www.manhattan-institute.org/pdf/cjr_04.pdf) [<https://perma.unl.edu/2YBQ-QYBG>] (analogizing claims to property and calling the principle that the injured person controls her own claim as a "bedrock principle of substantive law"). For a different critical take on this case law and literature, see Marcus, *supra*, at 1978 (discussing, and criticizing, the substantive conception of claim-control rights).

A complete intellectual history of the development of this account probably should give pride-of place to Benjamin Zipursky's late-1990s account of "substan-

cause this is an ownership right conferred for classic substantive reasons, namely respect for litigants' autonomy and dignity, advocates characterize it, naturally, as a "substantive right."<sup>68</sup>

The theory, suggested by Richard Nagareda and others, explains why Rule 23's mandatory provisions are interpreted so narrowly. Construed broadly, Rule 23 would conflict with litigants' rights to control their own claims, offending the Rules Enabling Act's prohibition on the use of federal procedures to abridge substantive rights.<sup>69</sup> The basic solution to conflicts between procedure and substance is to interpret the procedure narrowly to avoid the conflict.<sup>70</sup>

The idea is an appealing way of understanding the Court's cases.<sup>71</sup> For example, the narrowest interpretation of Rule 23(b)(2), another of

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tive standing" in tort law—although Zipursky has not written about class actions, he does argue that the structure of tort law implies that tort victims have a preexisting substantive right to control their own claims. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998). His influential work, in turn, preceded the new autonomy rights boom in class action scholarship, which has basically taken his tort-centric account and generalized it across in personam actions for damages.

Although Nagareda does not explicitly derive his understanding of "claims-as-property" from shared understandings, this is probably the most coherent interpretation of his theory, which pins the conception on the intent of "policymakers," but invokes evidence of shared background understandings of the "claim" rather than legislative history to prove that point. See Marcus, *supra*, at 1977 n.78 (quoting Nagareda, *Preexistence Principle*, *supra*, at 196 & n.205) (noting Nagareda identifies class members' property rights in their claims as rights "settled upon by policymakers," including legislators, administrators, and common law courts); Nagareda, *Preexistence Principle*, *supra*, at 160–61 (citing Supreme Court decisions and law review articles as the main evidence in favor of his view that "policymakers" intend to confer property-like control rights on claim owners). The link between shared background understandings and legislative intent is suggested somewhat more explicitly by Richard Epstein. See EPSTEIN, *supra*, at 2–3 (calling the principle that a claim owner controls the claim the "usual" rule, "self-evident," and a "bedrock principle[ ] of substantive law" and calling arguments to the contrary as "fairy tale[s]" and "heretical"). I raise questions about the coherence of this below. See *infra* text accompanying notes 92–95.

68. Rutherglen, *supra* note 67, at 285.

69. 28 U.S.C. § 2072(b) (2012).

70. Nagareda, *Preexistence Principle*, *supra* note 67, at 231 (arguing for a "grudging[ ]" interpretation of limited fund class actions in order to "repect[ ]" lawmakers' policy choices).

71. The precedential roots of this turn lie with one of the original premises articulated in *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950), for extending due process protections to represented parties: that their claims for redress are a form of constitutionally protected "property." *Mullane*, 339 U.S. at 313 (characterizing beneficiaries' "rights to have the trustee answer for negligent or illegal impairments of their interests" as a form of "property"). Because the power to dispose of property ordinarily resides in the property owner, the Court has hinted, beginning in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), at the idea that individual control over prosecuting the claim is itself a significant protected "property interest"—in essence one of the substantive entitlements

the Rule's mandatory provisions, is the one adopted in *Wal-Mart Stores, Inc. v. Dukes*: subsection (b)(2) reaches no further than claims for "indivisible" injunctive and declaratory remedies—that is, remedies targeting an institutional practice that affects a group of people in identical ways.<sup>72</sup> Remedying these types of wrongs inevitably involves representation, because even in the absence of a class action, an injured party's successful suit will remedy the injuries of the entire group. Representation is, in effect, baked in or "embedded" in the substance of the remedy.<sup>73</sup> Confined to this setting, Rule 23(b)(2) thus does not infringe class members' substantive rights. Rather, it implements those rights, while mitigating the agency problems that their enforcement would otherwise generate.

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that are due protection as a matter of procedural due process. *See id.* at 434 (characterizing the right to relief and accompanying "cause of action" for its violation as constitutionally protected property "own[ed]" by the claimant); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807, 813 (1985) (citing *Mullane* in support of the idea that a "chose in action" is a "constitutionally recognized property interest possessed by each of the plaintiffs" and concluding that "procedural due process" requires giving plaintiffs the power to "litigate" their claims "on [their] own").

Then in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court prefaced a discussion raising concerns about the "collectivism" of a mandatory class action (meaning its power to wrest away class members' ordinary control over the disposition of their claims) by invoking both the "general doctrine of constitutional avoidance" and the Enabling Act. *Id.* at 845–46. By treating the Enabling Act as a relevant barrier against disrupting class members' right to dispose of their own claims, the Court seemed to hint that it considered control rights to be substantive. *See* Marcus, *supra* note 67, at 1978 n.80 (noting that *Ortiz's* invocation of the Enabling Act supports the idea that the Court viewed claim-control rights as substantive).

The Court did not take up the hint in this passage again until 2010's *Shady Grove Orthopedics Association v. Allstate Insurance Co.*, 559 U.S. 393 (2010). There, the Court upheld Rule 23's application to a state claim for a statutory fine in the face of a New York law that forbade class treatment of such claims. *Id.* at 407–10. In his plurality opinion, Justice Scalia reasoned that there was a direct conflict between Rule 23 and New York's class action limit. Under *Sibbach v. Wilson and Hanna v. Plumer*, Scalia wrote, a Federal Rule trumps conflicting state law if the Federal Rule "really regulates procedure." *Id.* at 410 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941)). Because Rule 23 qualified as such a rule, it trumped. But, he added a caveat. Federal procedures, like the class action, which force "[un]willing" plaintiffs to give up control over their individual claims are a different story. *Id.* at 408. These abridge plaintiffs' "substantive right[s]." *Id.* (suggesting that Rule 23(b)(3) complies with the Enabling Act's prohibition against abridging substantive rights only so long as it permits "willing" plaintiffs to join their claims together). As Sergio Campos notes, Scalia's opinion is the clearest statement yet that the Court thinks that claims vest their owners with a "substantive" ownership right to control their enforcement. Campos, *supra* note 13, at 1061, 1118–19.

72. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

73. Nagareda, *supra* note 17, at 1118–20.



The narrowest interpretation of Rule 23(b)(1)(B), as the Supreme Court explained at length in *Ortiz v. Fibreboard Corp.*, is that it covers only cases where litigants' control of their own claims would totally deprive other class members of their rights to a remedy.<sup>74</sup> Limited fund class actions are the paradigm: Here, individualized litigation will deplete the fund before all of the victims can recover. Protecting some class members' rights to control their own claims would therefore deprive other class members of their remedy.

Limiting Rule 23(b)(1)(B) classes to this context, one version of the argument goes, does not abridge class members' substantive rights because the substantive right to control a claim does not extend to uses that would deprive other people of the free and equal use of *their* claims—a basic principle of equity that parallels a similar understanding of the limits on owners' right to control tangible property.<sup>75</sup>

In the process of explaining why Rule 23 is construed so narrowly, the theory also explains why the Court should eschew interest balancing in the course of interpreting the Rule. The reason is because interest balancing just isn't relevant. Legislators have ordered courts to give class members the "substantive" freedom to control their claims. As a result, even if balancing the relevant interests suggests infringing litigants' control of their claims would not offend due process, courts' hands are tied. It's up to the policy makers that created the cause of action to give Federal Rule interpreters and procedural rulemakers room to take advantage of the constitutional leeway by revoking that substantive right.<sup>76</sup>

74. See *Ortiz*, 527 U.S. at 841 (discussing the history of the principle favoring equal treatment of claim owners in nineteenth-century equitable limited fund precedents); see also Issacharoff, *supra* note 55, at 206 (discussing the narrowness of the Court's understanding of Rule 23(b)(1)(B)).

75. Cf. Claeys, *supra* note 32, at 1586 (noting eighteenth- and nineteenth-century property law, while generally giving property owners dominion over their property, did not protect uses that "restrain neighbors' equal freedom to use their own properties"). The same outcome can be justified by treating limited funds as a problem involving a "conflict" of preexisting rights to control the claim and to redress, requiring a "choice of [substantive] rights." See Nagareda, *Preexistence Principle*, *supra* note 67, at 231 ("Only when a conflict emerges in preexisting rights [to control the claim and to redress]—a conflict not generated by the class itself—need the law of class actions intervene to make a choice of rights.").

76. Not all academic theorists who subscribe to the idea that claim-control rights are a substantive entitlement accept this view of the relationship between due process and substantive law. Martin Redish, for example, seems to suggest that the extent to which procedures must respect the substantive claim-control right depends entirely on *Mathews*-style balancing. Redish & Larsen, *supra* note 12, at 1603–16. In his nuanced account, though, the fact that class members have a substantive right to control their claims significantly constrains what procedures are permissible. *Id.* Mark Weber, similarly, approached claim-control entitlements through the rubric of due process balancing, but argued that if claim-control is the protected "entitlement," then procedures that eliminate claim-control rights may generally amount to a due process violation even under the *Eldridge*

The theory's other nice quality is that it doesn't seem to take sides in the larger ideological debate about class actions and other forms of aggregation. It turns, at least ostensibly, on simple legislative intent, discernable through the humdrum tools of statutory interpretation. As a result, the "legislative intent" theory can claim the mantle of judicial restraint by ostensibly ceding tough policy questions about the proper scope of aggregation to the democratic process.<sup>77</sup>

*c. The Problem with the "Substantive Rights" Argument*

Despite its superficial appeal, this "legislative intent" theory of litigant autonomy also has a glaring problem. It depends on assertions that policymakers intend to confer claim-control rights when they create an underlying substantive cause of action. But few causes of action define the right to control them, which complicates—in many cases, fatally—the effort to pin autonomy rights on legislative intent.

To be sure, statutory text and legislative history sometimes specify standing, or claim-control, principles. The Fair Labor Standards Act, for example, now includes its own subject-matter specific class action procedure (called a "collective action"), which requires class members to opt in in order to be bound.<sup>78</sup> It plainly expresses Congress's intent to vest class members with a strong form of control over their own claims.

But this is the rare exception. Title VII's private right of action for backpay due victims of employment discrimination, the subject of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, is much more typical. The enforcement provisions of Title VII grant an enforcement right to a person or persons "aggrieved" by unlawful employment practices.<sup>79</sup> Yet, it should be apparent that this term, which defines statutory enforcement rights at a high level of generality, doesn't clearly define the ownership or control-rights that are embed-

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balancing test. Weber, *supra* note 12, at 389–90 ("[I]f one considers the protected interest to be the right to use the judicial system to adjudicate the individual's claim," then mandatory class actions may amount to a due process violation because they completely deprive class members of *any* safeguards for their protected interests.).

77. See also Campos, *supra* note 13, at 1119 (noting that "[o]ne appeal of focusing on the claim as the relevant 'substance' is that it provides a clear 'substantive right' that demarcates the permissible bounds of court intervention under the Rules Enabling Act").

78. 29 U.S.C. § 216(b) (2012) ("No employee shall be a party plaintiff to an[] [FLSA collective] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); see also *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (analyzing mootness problems in FLSA collective actions).

79. 42 U.S.C. § 2000e-5(b) (2012) (authorizing "persons aggrieved" to file charges with the EEOC); *id.* § 2000e-5(f) (authorizing a "civil action" by a "person aggrieved").

ded in a cause of action for back pay. The fact that “aggrieved persons” have a right to bring a civil action tells us a couple of things: (1) that enforcing the law has been privatized and (2) the identifying characteristic of the *class* of persons vested with enforcement power.<sup>80</sup> But it doesn’t tell us what we want to know: how, within the class of aggrieved persons, control over the enforcement of claims ought to be allocated. Complicating matters further is the Court’s own long history of flexibly interpreting Title VII to promote federal anti-discrimination policy.<sup>81</sup>

Nor is remedial structure a meaningful guide. Autonomy rights advocates sometimes seem to assume that statutes creating private rights to divisible or individualized compensatory relief indicate a corollary purpose to vest people entitled to that relief with control over their claims.<sup>82</sup> Yet, unless there is some logical link between the two, the corollary doesn’t follow. American culture has abandoned the nineteenth-century view that there is a “natural” link between compensatory remedies and individualized enforcement.<sup>83</sup> Nor is there a practical link. A compensatory remedy identifies a protected interest. But protection for that interest can be administered just as easily by assigning enforcement to a fiduciary. Yes, second-best “trial by formula” methods of proof may be necessary to facilitate this enforcement model; but these may do an even better job of maximizing average compensation than individualized proof methods.<sup>84</sup> Because

80. *Davis v. Passman*, 442 U.S. 229, 239 n.18 (1979) (a “*cause of action* is a question of whether a particular plaintiff is a member of the *class of litigants* that may, as a matter of law, appropriately invoke the power of the court”) (emphasis added).

81. Mark Moller, *Class Action Defendants’ New Lochnerism*, 2012 UTAH L. REV. 319, 331 (2012) (noting arguments that Title VII delegates authority to adopt burdens and presumptions that facilitate aggregated enforcement); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 163–64 (2009) (noting that “as a descriptive matter, courts have exerted substantial interpretive creativity with regard to statutes like Title VII,” which courts have felt free to dynamically develop on “more or less a common-law model.”).

82. Martin Redish sometimes seems to take this view in some of his recent writings on class actions. See Redish, *Democratic Difficulty*, *supra* note 67, at 76, 77 n.22 (suggesting that vesting individuals with a compensatory right reflects a substantive choice to vest the power to enforce the right “exclusively in the individual victim,” which he argues can be inferred from the statute’s decision to define the protected interest in “individual” terms); see also Issacharoff, *supra* note 12, at 1058 (adopting for argument’s sake the “older, more formal conception of a legal claim as a chose in which a distinct property interest accrues” and assuming that under this view divisible remedial rights imply an individual control interest in the right holder).

83. *Davis*, 442 U.S. at 239 (noting that the entitlement to redress is “analytically distinct” from the “cause of action”); see *supra* notes 29–32 and accompanying text.

84. Michael J. Saks & Peter David Blank, *Justice Improved: The Unrecognized Benefits of Sampling and Aggregation in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833–35 (1992).

protecting the interest marked out for protection by a compensatory remedy does not naturally or practically entail a particular enforcement model, the remedy doesn't tell us anything useful about the control-model that the legislature intends.

Perhaps one might instead infer how a statute like Title VII allocates standing based on the forms of proof the statute allows plaintiffs (or defendants) to present in support of (or against) backpay claims. In *Wal-Mart Stores*, the trial plan envisioned that a class of 1.5 million women would be able to recover based entirely on a "second best" system of make-shift presumptions and statistical formulas that made the massive claims feasible to try as a unit.<sup>85</sup> If the statute forbids these aggregation-friendly methods of proof, that's solid evidence that the statute was also intended to vest each employee with an entitlement to control his or her own claims. Yet, again, though, the text of Title VII is silent: The statute tells us that class members are limited to recovering for losses attributable to discrimination, but it does not expressly prohibit second-best methods for proving who suffered those losses. Federal courts have had to fill in the gap.<sup>86</sup>

Some autonomy rights theorists seem to reason not from the structure of a compensatory remedy, or the scheme for proving a right to that remedy, but from the statute's ostensible purpose.<sup>87</sup> A compensa-

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85. Justice Scalia derided this trial plan as "Trial by Formula." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

86. David Marcus argues that we ought to treat representative enforcement as part of the "substance" of rights of action for compensatory damages (whenever a scheme of individualized litigation creates practical impediments to suit). This argument is not subject to the same objection. See Marcus, *supra* note 67, at 1981–87. Although there are certainly instances where the practical impediments to sue are so great in the absence of representative actions that the only conclusion is that the legislators intended the scheme to be enforced through representative actions (statutes that provide a remedy for injuries that as a class mostly constitute negative-value claims are an example), many of the examples that Professor Marcus provides (for example, instances in which there are psychological or information-based barriers that might deter some injured parties from filing otherwise marketable suits) are not so clear cut. It is entirely possible, for example, that legislators might intend to commit actions in these contexts to individualized litigation, with the understanding that conflict-averse, indolent, or ill-informed litigants will simply forgo litigation, as a type of compromise between pro-regulatory and anti-regulatory interest groups. Even so, in these contexts, I do not read Professor Marcus to be making a formal claim about legislative intent, but instead to appeal to judicial policy making discretion in good realist fashion, based on implicit agreement with the point fleshed out above: that the scope for representative actions is a statutory gap that must be filled in judicially. My point of departure from arguments like Professor Marcus's therefore lies in the next Part, which identifies structural reasons for federal courts to adhere as closely as possible to a traditional standing default in spite of this gap. See *infra* sections III.A–B.

87. See Redish, *Democratic Difficulty*, *supra* note 67, at 75–76 (arguing that compensatory schemes are intended to provide a kind of self-help remedy and so reflect a

tory remedy is sometimes said to be a substitute for self-help—a private matter subject to each right holders’ autonomous agenda—making its purpose incompatible with enforcement by state-selected class representatives or other public surrogates.<sup>88</sup> The problem with this argument is that many state-provided remedies, like those created by Title VII, plausibly serve both private goals and public or collective goals (like deterrence) simultaneously.

Indeed, Kalven and Rosenfield emphasized at the dawn of the modern class action that collective or “semi-public” goals (e.g., deterrence) plausibly animate many of the privately enforceable statutory schemes enforced through the class procedure.<sup>89</sup> Paul Bator said much the same a half-century later:

It may be there was a time when pure common-law actions could be characterized as involving ‘only’ private rights. But when an injured worker seeks statutory workmen’s compensation, is the claim one of purely ‘private’ right? . . . A citizen’s suit to enjoin water pollution? A Title VII discrimination case? . . . The fact is that there is no intelligent way to answer these questions.<sup>90</sup>

If these statutes plausibly reflect public as well as private interests, then it is also plausible to think that vesting their enforcement in public surrogates furthers the statute’s purpose when doing so is necessary to overcome collective action problems that prevent or impair enforcement of claims by their owners.<sup>91</sup> And as result, pointing to the statute’s compensatory aims doesn’t settle how standing to control the claims it creates should vest. Because these statutes plausibly further both private and public goals, the standing model that we adopt depends on whether we think the legislature intended private interests to trump public ones when the two conflict. Yet, it is on this point that purposive analysis gives out.

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judgment to make any “incidental benefit to the public interest . . . wholly contingent upon the private victim’s decision to seek to judicially enforce her substantively created remedy.”).

88. For a sophisticated conceptual argument along these lines, with a focus on remedies for violations of core common law rights, see Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1878–80 (2011) (advancing an interpretive theory that explains core private law remedies, including both compensatory relief and injunctive relief, in terms of a “substitute for a wronged party’s right to rectify or prevent violations of her primary moral rights.”).
89. See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1940–41) (“[T]he class suit is a vehicle for paying lawyers handsomely to be champions of semi-public rights.”).
90. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L. J. 233, 250 (1990).
91. Consistent with this idea, the Supreme Court has interpreted burdens of proving intentional discrimination under Title VII in a way that is plainly designed to facilitate class enforcement. See, e.g., *Teamsters v. United States*, 431 U.S. 324 (1977).

Indeed, on this point, there is probably no legislative “purpose” to discover. Legislative silence about standing rights reflects a failure of legislative coalitions to come to any agreement on the matter.

The gap reflects a decision to punt instead—to courts, and to the shifting fortunes of the battle in the courts between the two main theories of litigant autonomy that have dueled since the 1970s, the procedural due process and fundamental rights theories canvassed above. Both effectively judicialized standing principles—procedural due process theory by casting claim-control as a flexible procedure subject to judicial control<sup>92</sup> and the fundamental rights theory by positing a relatively less flexible, judicially enforced constitutional standing norm.<sup>93</sup> In this, they are in many ways a continuation of the nineteenth century law of standing, which was itself a judicial creation (of the “general law.”)<sup>94</sup>

Against this backdrop, legislatures have largely given up trying to legislate claim-control rights. They treat the issue of statutory standing as something that would be filled in judicially according to the terms set by the victor in the see-saw battle between the competing constitutional camps. The problem dooms the new “substantive rights” theory of litigant autonomy and has lead critics like Judith Resnik to argue that this account dishonestly uses statutory interpretation to disguise interpreters’ own pro-autonomy values.<sup>95</sup>

### C. The Need for a New Theory

Because existing theories don’t convincingly solve the anti-balancing puzzle, there’s room for more work on why federal courts might treat litigant autonomy as deserving the degree of protection afforded to it. Below I offer a new solution.

Its starting point is an idea implicit in the “substantive rights” theory of litigant autonomy, namely the separation of powers. The substantive rights theory appeals to a specific separation of powers principle: the idea that federal courts, vested as they are with the “judicial power,” have only the power to apply the preexisting substantive law. They have no roving power to alter it.<sup>96</sup>

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92. See *supra* notes 42–49 and accompanying text.

93. See *supra* notes 59–60 and accompanying text.

94. See *supra* notes 28–32 and accompanying text.

95. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 151, 170 (2011) (suggesting *Dukes* reflects, at bottom, the majority’s views of the “utility and normative desirability of access to courts,” and the power of the value of “[a]utonomy expressed through personal participation” in the American “political and legal narrative”).

96. Nagareda, *Preexistence Principle*, *supra* note 67, at 158 (noting that his conception of claims as property rights leads to a normative argument for constraints on class litigation that “stems not only from the Rules Enabling Act as the statutory

But the substantive rights theory, as we've seen, ultimately doesn't work. Separation of powers principles are nonetheless an intriguing place to look for support for the Court's approach to litigant autonomy, if only because separation of powers principles do not call for the balancing of interests characteristic of due process analysis.

In the next Part, I turn to a different separation of powers value—the value of checks and balances—to lend courts' treatment of autonomy the formal support it needs. The argument requires taking a completely different view of litigant autonomy. Yes, it serves values we might characterize as “substantive”—it protects litigants' dignity or liberty. But it also has a procedural, or court regulating, dimension. It shapes how federal courts work, and it does so in a way that affects the relative power of federal and state courts.

This point, I show below, connects protecting litigant autonomy to existing checks and balances doctrine. And it does so in a way that provides a more coherent justification for the degree of protection that autonomy is currently afforded.

### III. A SEPARATION OF POWERS (AND FEDERALISM) THEORY OF LITIGANT AUTONOMY

One piece of our system of separated powers is Congress's control of federal courts' jurisdiction. Putting Congress in control, as the literature on process federalism tells us, protects state courts' shared role in governance by funneling any expansions of federal courts' power through the inertial barriers of the political process. It's an illustration of the familiar point that separation of powers, and the system of checks and balances that animates it, is an “aspect of”—a way of fostering—federalism.<sup>97</sup>

Scholars haven't paid attention to the way that checks and balances and federalism values bear on the debate over the scope of the federal class action. But those values are actually quite relevant.

Litigant autonomy is embedded within our system of limited federal jurisdiction. By overriding litigant autonomy, class actions change that system in a way that empowers federal courts at states' expense. Once we appreciate this, it's a short step to justifying narrow interpretations of the class action rule. By conserving litigant autonomy, narrow interpretations of the class action rule leave changes to an important feature of our system of judicial federalism with the po-

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primogenitor of Rule 23 but also, more fundamentally, from the appropriate division of lawmaking authority”); Marcus, *supra* note 67, at 1977–78 (discussing the centrality of the Enabling Act and separation of powers to Nagareda's arguments).

97. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001).

litical process, where, in our system of separated powers, those changes belong.

Some readers may initially resist this idea, but the impulse is just a function of the idea's newness. In the remainder of the Article, I show why the idea actually makes a lot of formal sense.

Section A unpacks how Rule 23, by disrupting litigant autonomy, allows federal courts to consolidate federal control over mass litigation. Section B then introduces the argument for narrowly construing Rule 23 that flows from this feature of the Rule. The argument builds on existing rules that dictate narrow constructions of enactments that expand federal courts' jurisdiction. I suggest these rules should be extended to the class action.

One potential point of resistance is the way this argument extends an interpretive attitude characteristic of "jurisdictional" law to a non-jurisdictional rule, the class action. In Section C, I show that doing so is actually consistent with existing doctrine: Congress's control over jurisdictional policy is protected through narrow interpretation of rules both jurisdictional and nonjurisdictional, and the approach argued for here is a natural, even inevitable, extension of existing case law.

Section D addresses some other potential objections to the argument, including (1) objections that any separation of powers concerns with broad constructions of Rule 23 are obviated by the Rules Enabling Act and the Class Action Fairness Act, as well as (2) objections that the argument is inconsistent with *Erie*.

## A. Class Actions and the Federal-State Balance

This part begins by exploring the federalism problem with federal class actions.

### 1. *Class Actions Expand What Gets on the Federal Judicial Agenda*

If you have power over the enforcement of a claim, you have the power to commandeer "the coercive powers of the civil justice system"—to put the claim, and the remedial interests it is meant to vindicate, in front of a court.<sup>98</sup> The power to control a claim is, in effect, the power to set the judicial dispute resolution agenda.

That agenda setting can in turn be subdivided into two categories: the power to put *issues* on the court's agenda and power to put remedial *interests* on the court's agenda. The two are separable. The for-

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98. Nagareda, *supra* note 17, at 1117; see also Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 824 (1924) (explaining how the claim or cause of action, used in the sense of "right of action," is in part a "right against the representatives of organized society, the courts").



mer flows from standing to control the presentation of the case by selecting a legal theory supporting recovery. The latter flows from standing to obtain judgments concluding the interests of third parties. The right of action can vest its owner with standing to choose which legal issues to put on the court's agenda without giving the claim owner the power to conclude, through her choices affecting the presentation of the case, any interests other than her own. For example, standing to assert traditional in personam rights, like a tort claim, is the power to put issues of tort law on the judicial agenda. But traditional private law standing also limits the plaintiff, through the litigation of those tort issues, to disposing only her own remedial interests.

Accounts of judicial agenda setting typically have a single-court focus—they discuss how a set of interests, among others, are picked out and placed before a particular court in a given suit.<sup>99</sup> My focus is on litigants' power to control whether interests get on either federal or state courts' agendas, which I will refer to below as “multi-jurisdictional agenda setting.” That power is a function of more than one variable. One is the degree to which jurisdictional rules enable forum shopping. The power to shape competing courts' relative share of dispute resolution would be nonexistent if the jurisdictional and venue rules in which claims are asserted limit litigants exclusively to either state or federal courts. My focus zeroes in on a different factor affecting multi-jurisdictional agenda setting: the standing principles that particularize who controls the right of action.

Assuming a system that creates forum shopping opportunities, the agendas of competing judicial systems are affected by how those standing principles define who can put interests before a court. This point can be appreciated by comparing what happens in a world with federal class actions to what happens in a world without them.

In a world without federal class actions, federal litigation is governed by traditional claim-control principles. Where an interest is protected by a remedy capable of being awarded on an individual basis (think a traditional compensatory damages remedy), those principles vest a right to sue in each of the individual interested parties with claims for that relief. By giving each interested party standing to enforce only her own claims, traditional claim-control principles give the power to put interests before a court to large number of dispersed injured parties. Each claim owner becomes an agenda setter for her own claim. As the number of agenda setters increases, so does the diversity of forum preferences. Litigants end up going to different courts—some federal, some state. The result is to spread the resolution of disputes between competing sovereigns' judicial systems.

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99. See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009) (discussing party-driven judicial agenda setting within the federal court system); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011) (same).

The point is dramatically illustrated by the typical trajectory of mass torts, which, in the wake of cases like *Ortiz v. Fibreboard* and *Amchem v. Windsor*, have proven difficult if not impossible to certify for class treatment.<sup>100</sup> The much-written-about *In re Vioxx Products Liability Litigation*<sup>101</sup> provides a dramatic example: After the Food and Drug Administration published allegations that Merck's arthritis drug Vioxx increases the risk of heart attacks and strokes, suits representing 20,000 plaintiffs were (as of 2008) filed against the pharmaceutical giant in or removed to federal court (and transferred by the Judicial Panel on Multidistrict Litigation to Judge Fallon in the U.S. District Court for the Eastern District of Louisiana), while actions representing an even larger number of plaintiffs (30,000) remained pending in state court.<sup>102</sup>

*Vioxx* involved cases filed before the Class Action Fairness Act's effective date. But as Edward Sherman predicted soon after the Act's passage, the pattern would persist if the Court continues to construe the scope of federal class certification narrowly.<sup>103</sup> J. Maria Glover's recent study of post-CAFA MDL proceedings bears this out. To take one example highlighted in her study, the claims in federal MDL No. 1699, *In re: Bextra and Celebrex Marketing, Sales Practices and Product Liability Litigation*, are mirrored by over 2,000 claims pending in state court.<sup>104</sup> All in all, a majority of all federal consolidated proceedings, and eighty percent of pending products-liability cases consolidated in federal court, are shadowed by non-removable state level litigation raising parallel claims.<sup>105</sup>

In a world where these claims could be certified as a federal class action, all of this litigation would have ended up in federal court. This points up that the class action, by divesting represented parties of control of their claims, is a powerful engine for centralization. Class actions concentrate that once-dispersed control in the class representative. When that representative opts for federal court, this gives federal courts the power to dispose of disputes involving class members who never chose a federal court and may not want to be there. The result is to consolidate federal control over interests that

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100. Issacharoff, *supra* note 55, at 208 (noting that after *Amchem* and *Ortiz*, class actions, with rare exceptions, "seemed to drop out of the available set of tools for attempting to settle most mass torts").

101. 760 F. Supp. 2d 640 (E.D. La. 2010).

102. Sherman, *supra* note 4, at 2214.

103. *See id.* at 2208 (noting how *Vioxx*-style mass tort litigation spread through disparate state forums could become the norm after CAFA if federal courts continue to take a restrictive view of class certification in the mass tort context).

104. Glover, *supra* note 1, at 11 n.31.

105. *Id.* at 10. Glover calls the "problem of parallel state court proceedings" a "significant one." *Id.*

would otherwise have been spread between federal court and competing state forums.

This centralizing effect is partly a function of the fact that class actions operate outside ordinary rules of subject matter jurisdiction. By combining claims into a class action, claims in which there's no diversity of citizenship, for example, can get into federal court when bundled with claims that are diverse. This is something that was true before the Class Action Fairness Act ("CAFA") and that is true, to a much greater degree, after CAFA.

But this centralizing effect is not just a product of special rules of jurisdiction applicable to class actions. It is also a function of the transfer of control over class members' claims that the class action accomplishes. There are myriad disputes in which plaintiffs, in the absence of a class action, have a choice between state and federal forums. Absent a class action, they can lock their claims in state court by exploiting their control over how the claim is structured—by choosing state rather than federal legal theories of relief and by choosing to sue non-diverse instead of diverse defendants and the like.<sup>106</sup> But when a federal class action centralizes control over these claims in one plaintiff, it cuts off class members' ability to exploit their control over the claim to avoid a federal forum.

The point underscores that the federal class action *itself* plays a role in changing what gets on the federal agenda—by disrupting litigants' traditional right to control their own claims. The result is that you can't understand the real scope of federal court's power without knowing *both* the rules of subject matter jurisdiction and the breadth of opportunities for federal class certification. Both independently shape the ultimate degree of power federal courts can wield in our federal system.

## 2. *Class Actions Expand the Scope of Federal (Judicial) Preemption*

The last section showed that traditional private law standing principles, by giving each claim-owner control of her own claim, spread claims across federal and state courts. The spreading effect of decentralizing control over individually marketable claims isn't terribly con-

106. See, e.g., *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (quoting 16 James WM. Moore et al., *MOORE'S FEDERAL PRACTICE* § 107.14[2][c] (3d ed. 2005)) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties."); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 12 (2003) ("The [well-pleaded complaint] rule makes the *plaintiff* the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."); *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) ("[P]laintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum.").

troversial. The full implications of squelching that effect through the class action, though, often goes unnoticed.

Federal procedures that disrupt plaintiffs' control over forum choices have been characterized as a form of preemption. Allan Erbsen, for example, characterizes removal this way. "Instead of preempting the exercise of state legislative power," he writes, "[removal] preempts the exercise of state judicial power."<sup>107</sup>

The concentrating effect of the federal class action might be characterized similarly. Agenda-setting power is preemptive power. Just as removal gives a federal-preferring defendant the power to take the resolution of a case away from a state court, the class action, by giving the class representative the ability to put class members' interests before a federal court, also gives that court the power to preempt state courts' ability to remedy those interests.

Of course, it is important not to overstate the preemptive effect of the federal class action, and this section, accordingly, takes care to qualify this point while also demonstrating its essential accuracy before moving on with the argument.

First, the qualification: The preemptive effect of a class action also depends on collateral rules regulating federal courts' power to issue antisuit injunctions, rules that determine which of two courts with overlapping jurisdiction over a matter take priority,<sup>108</sup> and rules that define the back-end principles of non-party preclusion. All of these rules calibrate the preemptive effect of a plaintiff's choice to put interests on a federal court's agenda.

Consider, first, the scope for antisuit injunctions. The extent of federal courts' power to enjoin parallel state actions by proposed class members, particularly those embraced by federal mandatory class actions and suits consolidated under 28 U.S.C. § 1407, remains hazy and much debated. But, at a minimum, the Anti-Injunction Act<sup>109</sup> (AIA) bars federal courts from enjoining first-filed, in personam state actions by class members, at least in the absence of an imminent federal settlement or an MDL consolidation order.<sup>110</sup> In cases involving later-filed state suits (to which the Anti-Injunction Act does not apply),<sup>111</sup>

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107. Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 82 (2010).

108. See, e.g., Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010) (analyzing, and critiquing, priority rules).

109. 28 U.S.C. § 2283 (2012).

110. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977); *In re Baldwin-United Corp.*, 770 F.2d 328, 336–38 (2d Cir. 1985) (holding that the existence of an imminent federal settlement in an MDL proceeding justified an injunction in in personam actions under the AWA's exception for injunctions "necessary or appropriate in aid of" federal jurisdiction).

111. See *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (stating that the AIA and its predecessors "do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted.").

federal courts have tended to read the All Writs Act (the organic source of federal courts' authority to issue antisuit injunctions)<sup>112</sup> to import a similar set of restraints, with the result that federal courts also generally will not enjoin *later*-filed, in personam state actions by class members, again absent an imminent federal settlement or MDL consolidation.<sup>113</sup>

Yet, even in a world governed by the AIA, federal class actions can still preempt state courts' consideration of class members' claims. Under the modern approach to preclusion, a first-in-time federal class judgment wipes out parallel state claims, arising out of the same transaction, by those who did not or could not opt out of the federal class.<sup>114</sup> The result is that the AIA carves out *some* room for states to resolve claims included in a federal class action if class members institute parallel state suits. But, to avoid preemption, the state court must win the race to a judgment. The AIA thus operates as a soft hedge against federal preemption rather than as a complete shield.

The extent of opportunities to collaterally attack class judgments can similarly dial down federal courts' preemptive power. Current law has equivocated on the extent to which collateral attack is open to class members. The two poles are marked out by two different federal circuit opinions. In *Stephenson v. Dow Chemical Company*,<sup>115</sup> the Second Circuit articulated the minority approach among the circuits: it upheld the power of later courts (state or federal) to entertain collateral attacks on the certifying court's finding that a representative was adequate, thereby creating a quite significant loophole in the preclusive effect of an earlier class judgment. A subsequent Ninth Circuit authority, *Epstein v. MCA Inc.*,<sup>116</sup> articulates what appears to be the dominant approach among the circuits: it affords strong preclusive effect to judgments obtained following a formal pre-certification inquiry

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112. 28 U.S.C. § 1651 (2012).

113. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d at 335 ("While the parties agree that the Anti-Injunction Act is inapplicable here since the injunction below issued before any suits were commenced in state court, cases interpreting this clause of the Anti-Injunction Act have been helpful in understanding the meaning of the All-Writs Act."); *see also* Martin Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977) (arguing that restrictions on antisuit injunctions under the AWA and AIA should be interpreted similarly).

114. *See, e.g., Blair v. Equifax Check Serv. Inc.*, 181 F.3d 832, 838 (7th Cir. 1999) ("When the cases proceed in parallel, the first to reach judgment controls the other, through claim preclusion . . ."); RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 14 cmt. a (AM. LAW INST. 1982) ("Thus when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action (assuming any further prerequisites are met), regardless of which action was first brought.").

115. 273 F.3d 249 (2d Cir. 2001).

116. 179 F.3d 641 (9th Cir. 1999).

into the representative's adequacy along the lines embodied in Rule 23.<sup>117</sup> The Supreme Court has not yet decided which approach is right.<sup>118</sup>

Which one *is* right affects the degree of preemption generated by a class judgment. The approach taken in *Stephenson*, for example, conditions preemption on the outcome of a second court's de novo review of the representative's adequacy at the behest of disgruntled class members.<sup>119</sup> This generous opportunity to collaterally attack the class judgment considerably softens its preemptive effect, dialing it back to something that approaches the status afforded prior decisions under the law of the case doctrine.<sup>120</sup>

The preceding discussion thus underscores that the preemptive effect of federal judgments in our system of jurisdictional competition is the product of a complex array of rules. Through limits on antisuit injunctions, priority rules, and principles of preclusion, our system finely calibrates the scope and degree of federal courts' preemptive power. This makes judicial preemption more of a precision mechanism than its blunter cousin, legislative preemption.

But, for our purposes, the key point from the foregoing discussion is that one working part of that precision mechanism—indeed, the master spring on which the other working parts' operation is dependent—is standing. Standing principles that regulate who controls a private right of action affect the scope of issues and interests that get put on the federal agenda in the first place; they thus set limits around the outer possible preemptive scope of a federal judicial judgment. Traditional private law standing norms narrow the preemptive scope of federal judgments to the individual interests of those who actually come into court. Class actions broaden that scope.

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117. *Id.* at 648 (“Due process requires that an absent class member’s right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.”).

118. The Court granted certiorari to resolve the issue in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003), but split 4-4 after Justice Stevens recused himself, leaving the issue unresolved.

119. William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 814–15 (2007) (quoting Reply Brief for the Petitioners at 8 n.4, *Stephenson*, 539 U.S. 111 (2003) (No. 02-271), 2003 WL 470195)) (noting *Stephenson* effectively reviews the earlier court’s adequacy determination de novo, with the result that the “original district court’s adequacy determination . . . get[s] less deference on collateral review than on direct appeal, where it is reviewed for abuse of discretion.”).

120. Professor Rubenstein analogizes the collateral attack permitted by *Stephenson* to a motion for relief from a judgment beyond the time permitted by Rule 60 of the Federal Rules of Civil Procedure. Rubenstein, *supra* note 119, at 814.

The other collateral rules discussed above (those embodied in the Anti-Injunction Act or principles regulating collateral attacks by represented parties) build on top of the standing principles operative within the system to fine tune the degree of power that federal courts have to preemptively decide issues and interests that get put on their agenda, dialing that power up or down.

## **B. A New Separation of Powers Argument for Construing Rule 23 Narrowly**

This Part turns from the functional point made above—that federal class actions, by overriding claim owners’ autonomy to control their claims, expand federal courts’ power to preempt state courts’ control over mass litigation—to outline a formal argument for construing Rule 23 narrowly.

### *1. Private Law Standing as a Component of the System of Concurrency*

The last section unpacked how traditional standing principles spread the resolution of interests across federal and state courts, and limit, in the process, the power of federal courts to preempt states’ remediation of litigants’ interests. This opens the way to thinking about the traditional private law standing principle—that injured parties control their own claims—as a core feature of our system of judicial federalism.

Our system of judicial federalism—what I will call, here, the system of “concurrency” for short—is built around jurisdictional competition between federal and state courts with broadly overlapping authority. That system of jurisdictional overlap and competition was a compromise alternative to, as Alison LaCroix puts it, a “complete . . . consolidation” of federal power over areas within Article III’s jurisdictional grants.<sup>121</sup> It can be described, as I have argued in a previous article, as a hedge—it hedges against the threat, much discussed during the ratification debates, of federal power grabs accomplished via expansive interpretations of those unavoidably fuzzy jurisdictional boundaries.

It does so by making those boundaries extremely porous.<sup>122</sup> Plaintiffs are for the most part rarely stuck with one forum or another, particularly in complex cases. They are, instead, given a choice of broadly overlapping forums, and, along with that choice, the power to control—through the theory of the case, the party structure, and the venue in which the case is filed—whether a dispute is heard in state

121. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 192 (2010).

122. Moller, *supra* note 11, at 123–25.

or federal court. The result is that cases can slip away from federal courts' grasp, regardless of how expansively federal courts interpret the subject matter they can hear, making concurrency a more effective guarantee of shared federal-state governance than a strategy of constraining federal judicial power solely through vague limits on subject matter jurisdiction could accomplish alone.<sup>123</sup>

Traditional claim-control principles play a central role in this system. That role can be usefully analogized to what Tom Merrill calls a "property strategy" for checking and balancing government power.<sup>124</sup> As he says, individual property rights decentralize control over resources "rather than concentrating them in the hands of one . . . state bureaucracy . . . or other collective decision-making body." This dispersion of resources "tends to diffuse power—although not perfectly, of course."<sup>125</sup>

Traditional claim-control does something similar in our system of concurrency. Claim owners get complete control over the claim, including where it gets filed. And by diffusing this power among a decentralized network of claim owners empowered to choose between competing forums, this traditional standing norm helps ensure a healthy radiation of cases out of federal courts' reach and into state court.

And, as a result, our system of concurrency might be thought of as a specialized type of "property strategy"—one that combines decentralized claim ownership with judicial competition to spread resolution of remedial interests across the federal-state boundary, hedging against its concentration at the federal level.

By presenting traditional claim-control entitlement, here, as a historic component of our system of concurrency, I do not mean to suggest that Congress adopted this feature of the traditional law of standing when it enacted positive grants of concurrent jurisdiction. In many contexts, post-*Erie*, courts have continued to adhere to pre-*Erie* principles of federal common law.<sup>126</sup> That is, I would argue, the best way to conceptualize the "substantive rights" argument for litigant autonomy: It is an unconvincing attempt to re-package a feature of the pre-

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123. *Id.*

124. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2063 (2012).

125. *Id.* at 2087. The argument here parallels the familiar point that traditional standing principles "promote separation of powers by preventing courts from setting their own agendas, as is the prerogative of the legislature." Frost, *supra* note 99, at 460.

126. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1271 (1996) (arguing enclaves of federal common law persist because they fall outside states' legislative competence and further the "constitutional scheme"); Nelson, *Unwritten Law*, *supra* note 28, at 662–63 (discussing federal courts' tendency to "statutize" general law by reading it into statutes enacted post-*Erie*).



*Erie* common law of standing as an implicit “substantive” choice of the lawmakers who create modern private rights of action.<sup>127</sup>

But even though traditional claim-control entitlement is best conceived as a surviving principle of federal common law, it is still part of the scheme of concurrency. Here, Stephen Sachs’s work on backdrops helps make the point. The Constitution, he writes, was ratified against a backdrop of unwritten common law rules, and in some cases the Constitution, although it is not the “source” of these rules, builds on these rules and insulates them from legal change.<sup>128</sup>

The same point works for Congress’s jurisdictional framework. Concurrency has historically operated as a system that hedges against federal consolidation through a system of decentralized forum choice—what this section calls a property strategy. Because the traditional claim-control entitlement was part of the fabric of the unwritten general law, Congress didn’t have to “adopt” this standing norm to put this scheme into effect; it simply had to build on top of it.

## 2. *Entrenchment of Private Law Standing Principles by the Separation of Powers*

Thinking of concurrency as a system shaped by traditional standing principles, in turn, marks traditional claim-control out as a subject of a rule with a long history in the law of federal courts: Congress controls jurisdictional policy and the institutional arrangements that effectuate that policy.<sup>129</sup> Separation of powers is (as Ernest Young puts it) “an aspect of federalism.”<sup>130</sup> Young refers to Herbert Wechsler’s familiar idea that the political process is a safeguard of federalism.<sup>131</sup> In Brad Clark and Ernest Young’s updated version of the argument, Congress’s control of federal lawmaking protects state autonomy because the difficult process of federal lawmaking leads to inertia, slowing the expansive tendencies of the federal government.<sup>132</sup>

127. Cf. Nelson, *Unwritten Law*, *supra* note 28, at 662–63, 723–57 (noting modern federal courts tend to assume federal statutes incorporate principles of background general law).

128. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1836–37 (2012).

129. See *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990); *Finley v. United States*, 490 U.S. 545, 554 (1989); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941); see also Fitzgerald, *supra* note 8, at 1274 (“[The] first principle of limited federal power supports a corollary notion: the scope of an institution’s power—its jurisdiction—must be determined by a source outside that institution itself.”).

130. Baker & Young, *supra* note 97, at 128.

131. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

132. See, e.g., Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1707 (2008) (discussing the checks and balances logic of Con-

The framers, by putting Congress in control of federal jurisdiction, embraced separation of powers as a federalism safeguard in the arena of judicial federalism, too. Articles I and III together give Congress broad control over federal jurisdictional policy in order to protect state courts from federal encroachment.<sup>133</sup> And federal courts enforce that allocation of power, as the Supreme Court has repeatedly put it, through “interpretation”—that is, by narrowly interpreting laws that change jurisdictional policy, requiring Congress to speak pretty clearly if it wants to define federal courts’ authority expansively.<sup>134</sup> Hence federal courts construe grants of jurisdiction as concurrent even if the statutes don’t say anything about concurrent jurisdiction.<sup>135</sup> Doing this prevents federal courts from usurping Congress by exploiting ambiguity to extend their power in ways Congress didn’t intend.<sup>136</sup>

Once the traditional claim-control norm is understood as part of the scheme of concurrency, it falls within the domain of that same clear statement rule or “resistance norm,” opening the door to the claim in this section:<sup>137</sup> Just as federal courts ought to read laws that alter federal “jurisdiction” narrowly, they ought to construe procedures, like Rule 23, that displace the traditional standing principle—“that litigation is conducted by and on behalf of the individual named parties only”<sup>138</sup>—narrowly.

The argument works regardless of whether the first Congress appreciated the jurisdictional effect of traditional claim-control when it created the concurrency system. Congress erected a system of juris-

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gress’s control of preemption); Clark, *supra* note 10 (same); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17 (2013) (same); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 88 (2004) (discussing how separation of powers harnesses the lawmaking process to protect states).

133. *Lockerty v. Phillips*, 319 U.S. 182 (1943).

134. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008) (emphasizing the “established principle that ‘[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .’”) (citation omitted); *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990); *Finley v. United States*, 490 U.S. 545, 554 (1989); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941); see also Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553, 1559 (2000) (noting that clear statement rules are often used to enforce “structural values such as those embodied in Article III”).

135. *Tafflin*, 493 U.S. at 459–60.

136. I previously discussed the role that clear statement rules play in the enforcement of Congress’s power over federal courts in Moller, *supra* note 11, at 115–16.

137. “Resistance norm” is Ernest Young’s term (a term I adopt below) for clear statement rules that reinforce constitutional structure. See Young, *supra* note 134, at 1553.

138. See *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979).

dictional competition against the backdrop of traditional standing principles.<sup>139</sup> Maybe Congress thought these principles were integral to the system it created. Or maybe it never considered the question. But the fact remains that the system it created *is* shaped by those principles. Federal courts discard them at the price of changing how the system works and federal courts' role in it. That means, of course, courts cannot respect Congress's control over the concurrency system unless they leave alteration of traditional claim-control principles, along with other features of that system, to the political process.

The point is illustrated by *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>140</sup> a nonjurisdictional case—but one that reflects the same checks and balances logic. Up to a point, federal civil jury trials are mandated by the Seventh Amendment. But in contexts outside the Seventh Amendment's mandate, federal courts submit cases to juries as a matter of traditional federal practice (or, in *Erie* parlance, procedural common law).<sup>141</sup> That practice, *Byrd* held, trumped a conflicting state practice of submitting the state statutory immunity question at issue to bench trials.<sup>142</sup> *Byrd's* holding, in effect, applied of the Rules of Decision Act narrowly—federal courts must reassure themselves that the state bench-trial practice clearly furthers a state substantive policy before jettisoning a historic constraint on their power.<sup>143</sup>

The rationale for this result, the Court wrote in *Byrd*, is a “strong” pro-jury “federal policy.”<sup>144</sup> That policy was not fidelity to the intent of the Seventh Amendment's framers—the Court, indeed, eschewed deciding whether the Seventh Amendment reached the case at hand.<sup>145</sup> Nor was it fidelity to a congressional pro-jury policy—the

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139. See *supra* notes 28–32 and 124–128 and accompanying text.

140. 356 U.S. 525 (1958).

141. *Id.* at 538.

142. *Id.* at 536.

143. The absence of such a clear statement seemed to be the gist of the Court's complaint in *Byrd*. There, an electric utility company invoked a West Virginia worker's compensation scheme as a source of immunity from a negligence suit brought against it by a lineman working for a subcontractor. *Id.* at 526–27. The availability of this immunity defense turned on the type of work the plaintiff was performing. *Id.* at 527. State judges, said the Court, had simply fallen into the practice of deciding, without the aid of juries, whether plaintiffs performed the kind of work that brought them within the exclusive jurisdiction of the worker's compensation system. *Id.* at 535–36. But the state worker's compensation act did not clearly “announce” that judicial determination of the facts on which the commission's jurisdiction hinged was “an integral part” of the worker's compensation scheme. *Id.* at 536; see also Campos, *Enforcement Defaults*, *supra* note 39, at 1629–30 (suggesting using *Byrd's* “bound up” language as the doctrinal hook for a clear statement approach to identifying state substantive rules).

144. 356 U.S. at 538.

145. *Id.* at 537 & n.10 (noting the decision reflects “the influence” of the Seventh Amendment but refusing to decide whether the Seventh Amendment compelled

Court characterized the right to jury trial in the case as an entrenched *judicial* practice.<sup>146</sup>

A better explanation is fidelity to constitutional structure. Akhil Amar argues that the civil jury trial right can be viewed as a kind of intrabranch check on federal courts.<sup>147</sup> The jury would not only check unaccountable federal judges, but also inject localism into federal courts' decision making.<sup>148</sup> That point links *Byrd*'s holding to the principle that Congress is in charge of dialing up the scope of federal judicial power and its corollary, that federal courts should not aggrandize themselves in the absence of Congress's clear say so. In the face of uncertainty about the import of the Rules of Decision Act for the judge-made federal jury trial right, federal courts should tread cautiously and discard that right only if a bench trial is clearly an essential component of a state substantive scheme.

The result is that the separation of powers entrenches a customary constraint on federal courts' power. Congress can order federal courts to water down the jury constraint when states adopt different fact-finding procedures even further, if it wants (subject to outside limits imposed by the Seventh Amendment), but *Byrd* puts Congress firmly in charge of making that call by resolving doubts in favor of conserving that constraint.<sup>149</sup>

Substitute claim-control for juries and you have the claim in this Article. Traditional claim-control is a dial setting that affects the scope of federal courts' preemptive power, one that shapes our system of concurrency. This marks traditional claim-control norms out for conservation until Congress, or the rulemaking system it has set up to act as its surrogate, clearly displaces them. Those norms are the lowest or most constraining setting on the dial, and maintaining that setting respects the fact that Congress alone gets to dial federal courts' power up.<sup>150</sup>

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the result); see also Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949 n.164 (2006) (noting that the Court's willingness to balance federal and state policies "defies] a conclusion that the [Court relied on a judgment that the] result was constitutionally compelled" by the Seventh Amendment).

146. 356 U.S. at 537–38.

147. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 88–93 (1998).

148. *Id.* at 88–89 ("The jury was not simply a [majoritarian] body but a local one as well," which would inject local "community values" into federal judicial proceedings.).

149. 356 U.S. at 536.

150. Cf. Anthony J. Bellia & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1799 (2010) (making an analogous point—that constitutional structure entrenches a preexisting common law rule—with respect to traditional rules of the law of nations).

The idea ends up in much the same place as the new “substantive rights” argument for litigant autonomy but for a different reason. The new “substantive rights” argument, as Part II discussed, avoids the supposed “conflict” between Rule 23 and class members’ “substantive” rights by adopting the narrowest interpretation of Rule 23’s mandatory provisions—limiting them to cases, like those involving limited funds and indivisible remedies, where representation is, as a practical matter, an essential predicate to providing a remedy at all.<sup>151</sup>

The approach outlined here favors the same narrow interpretation—but without the extra step of positing that traditional standing norms are a preexisting “substantive” right. Federal courts should narrowly confine Rule 23’s mandatory provisions to this set of cases anyway, because it’s the narrowest available interpretation of Rule 23’s mandatory provisions and adopting that interpretation enhances Congress’s control of the system of concurrency.

I would also tentatively favor, as others have proposed, limiting Rule 23(b)(3) to negative-value claims, a rule that might operate through Rule 23(b)(3)’s superiority requirement.<sup>152</sup> This would harmonize (b)(3) with Rule 23’s other provisions—the Rule, writ large, supplies an enforcement procedure only when privately enforceable remedial rights require, as a practical matter, representative standing to be given any effect. This approach is already hinted at in *Amchem Products, Inc. v. Windsor*, where Justice Ginsburg, after detailing the myriad problems with certification of a mass tort under Rule 23’s internal standards, noted, as additional reason to deny certification, that the drafters of the rule “had dominantly in mind vindication of ‘the rights of people who individually would be without effective strength to bring their opponents into court at all.’”<sup>153</sup> A resistance norm approach would simply take Justice Ginsburg’s hesitation about applying Rule 23(b)(3) to marketable claims one step further, in light of doubt about how far rulemakers intended the rule to go, by excluding these types of claims from Rule 23’s domain.<sup>154</sup>

151. See *supra* notes 71–76 and accompanying text.

152. Cf. EPSTEIN, *supra* note 67, at 14 (arguing for this approach in mass tort actions); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Non-resident Class Members*, 98 COLUM. L. REV. 1148, 1164 & n.70 (1998) (noting that the “framers” of Rule 23 did not envision the expansive interpretations of the rule that have emerged,” including “adventuresome” applications of the Rule to expansive mass torts, “a point frequently overlooked by lawyers and judges”).

153. 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

154. An alternative approach to squaring Rule 23(b)(3) and the resistance norms idea would build on Justice Scalia’s suggestion in *Shady Grove*: Rule 23(b)(3) is a voluntary joinder mechanism, essentially a souped-up version of Rule 20. *Shady Grove Orthopedics Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (characterizing Rule 23 as a “species” of “traditional joinder,” which “allows willing

The same points carry over to the more complex arena of federal–state choice of law problems. Under current law, Rule 23 governs state claims, absent a clearly “substantive” state rule that would forbid class treatment. This is the gist of Justice Stevens’ concurrence in *Shady Grove Orthopedics Associates v. Allstate Insurance*,<sup>155</sup> which, as the narrowest opinion, is the holding of the case.<sup>156</sup> The theory here situates Rule 23 as part of a broader federal law of standing—it is an exception to customary standing rules traditionally operative in the federal system, and one that is construed narrowly. What the theory accordingly adds is an explanation why, when state claims fail the federal test for certification, federal courts apply those claims consistently with customary private law standing norms—because these norms are default rules of *federal* law that are traditionally operative in the federal system, reflecting a strong federal policy favoring lim-

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plaintiffs to join their separate claims” together). It does not, the argument would go, affect class members’ right to control their claims. Its opt-out mechanism, rather, *preserves* their ability to take control of their claims. The Rule simply gives them a new mechanism through which they can consensually combine those claims together. As result, Rule 23 is consistent with traditional standing norms and so doesn’t need to be narrowly construed as a derogation of those norms.

As a solution to the structural problem posed here, though, this is less than satisfying. As others have noted, although Rule 23(b)(3) can be conceptualized as a claim-joinder device, there is, in practice, very little truly “voluntary” about it. Few class members read or understand the consequences of their opt-out notices, with the result that Rule 23(b)(3) in practice operates as a kind of mandatory class in disguise: it more often than not sweeps unwitting claimants into a federal proceeding and imposes a federal judgment on them, without any meaningful “consent” on their part. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2086–87 (2008) (questioning the theory that failure to return an opt-out notice meaningfully evidences “consent to be bound”); Eisenberg & Miller, *supra* note 40, at 1532, 1561 (noting less than one percent of class members in all class actions actually opt-out and raising doubts, based on these numbers, about whether class members who fail to opt-out really consent to 23(b)(3) class actions instituted on their behalf). As a result, it really ought to be viewed as an override of traditional standing norms, rather than an accommodation of them.

It is for that reason that I tend to think the separation of powers principles here would require us to push further. Rule 23(b)(3), too, should be narrowly interpreted. One way to take this idea is, as I say above, to adopt Epstein’s view that Rule 23(b)(3) is confined to claims for damages, like negative-value claims, that depend on representation for their enforcement. If we take this view, Rule 23(b)(3) simply becomes a procedure for effectuating representative standing when it is baked into the underlying substantive scheme. On this view, the opt-out rights that Rule 23(b)(3) provides do not respect class members’ preexisting “right” to control their claims, but rather offer an extra layer of procedural protection against heightened agency problems with litigation that the rulemakers thought were endemic to damages actions.

155. 559 U.S. 393, 416 (2010).

156. *See infra* note 157.

ited federal judicial power and, with it, federal–state power sharing.<sup>157</sup>

### C. Consistency of the Approach with the Application of Separation of Powers in Other Contexts

The finer points of operationalizing this idea are somewhat complicated, and the notes in the last section expand on how to do so. In line with the Article’s pretty modest purpose—outlining in a preliminary

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157. One can imagine cases where state claims are individually marketable, but the action is designed to function as a private attorney general mechanism in order to further substantive policies like deterrence. Medical monitoring torts may be one example. There are surely others. Several scholars argue that such claims should be amenable to federal certification in one form or another and that construing Rule 23 otherwise does damage to the underlying substantive law.

The argument here is not to the contrary. Where representation is essential to enforce state-conferred substantive rights, because those rights presuppose a representative mode of enforcement, then the Rules of Decision Act and the Rules Enabling Act together create an exception to the usual federal standing rule. Federal courts’ obligation to avoid the “abridgement” of the underlying substantive rights would, in that case, militate in favor of class certification.

A resistance norm approach, consistent again with *Byrd*, asks only that federal courts reassure themselves that representative actions are clearly “bound up” with (i.e., an essential to the enforcement of) the parties’ substantive rights before abandoning traditional federal standing principles and applying Rule 23 more expansively. If, by contrast, the state legislature has not clearly committed to any substance-specific standing policy, that approach would enforce the cause of action consistently with the standing principles operative in the federal system—consistently, that is, with traditional standing norms, subject to the generally applicable exceptions to those norms that Rule 23 carves out, at the federal level, for negative-value claims, claims seeking indivisible remedies, and claims against limited funds.

Clear statement rules work best when they give legislators a simple way to announce their intent to override the default. In this regard, a resistance norm approach does not need to reinvent the wheel. Justice Stevens’ concurrence in *Shady Grove*—which, as the narrowest opinion, represents the holding of the case—suggested just such a simple rule, one with old roots in choice of law doctrine: States demonstrate a substantive purpose, he said, when they announce standing rules specific to particular rights of action. *Shady Grove*, 559 U.S. at 432–33, 433 n.16 (Stevens, J., concurring) (noting the fact the New York limitation on class actions was framed as a general law, rather than one specific to particular New York causes of action, gave rise to a “strong presumption” that the rule was adopted largely for “procedural” purposes); cf. *Bournias v. Atl. Mar. Co.*, 220 F.2d 152 (2d Cir. 1955) (adopting a similar clear statement rule for horizontal choice of conflicting statutes of limitations). That type of simple clear statement approach can be defended on pragmatic grounds: it cuts down on information costs involved in assessing state substantive policy and, because it gives legislators a simple way to signal their intent, reinforces democratic control over policy making. See, e.g., Campos, *Enforcement Defaults*, *supra* note 39, at 1629–30 (making these points with respect to his own proposal for a clear-statement-type substance/procedure screening rule). A resistance norm approach ends up in much the same place, based not just on these pragmatic considerations but also on formal grounds, as an outgrowth of the separation of powers.

way an alternative separation of powers argument for construing Rule 23 narrowly—this section limits itself to responding to one potential big picture objection. Although Congress’s control of federal jurisdiction in the technical sense is uncontroversial, extending “jurisdictional” separation of powers principles to nonjurisdictional “procedural” rules is likely to strike some readers as a stretch. The challenge is important because the argument here appeals to fidelity to an existing understanding of separated powers, and so it has force only to the extent it fits the way the Court has construed separation of powers principles in other contexts.

As the preceding sections underscore, the scheme of concurrency is not just a product of “jurisdictional” law in a strict sense. It is a product of several inputs. One is the basic statutory grant of concurrent jurisdiction, which gives litigants a choice of forums. The second are the rules, like those codified in the Anti-Injunction Act,<sup>158</sup> that limit the power of federal courts to preempt states’ consideration of the issues and interests that get onto the federal judicial agenda.<sup>159</sup> The third are the rules—jurisdictional and nonjurisdictional—that affect what gets on the federal agenda in the first place.<sup>160</sup> All of these inputs combine together to create a *system* of jurisdictional competition or, in this Article’s parlance, “concurrency.”

This section shows that separation-of-powers-driven resistance norms cover all of the inputs that comprise this system.<sup>161</sup> And, crucially, these resistance norms pervasively regulate agenda setting—not only what issues can be put on federal or state agendas, but who can put them there, and their incentives to do so. Because traditional claim-control is a kind of agenda setting *Gründnorm*, it naturally falls within the domain of this separation of powers framework and the resistance norms that enforce it. Excluding claim-control from that framework would, indeed, make the law less, not more, coherent.

### 1. *Antisuit Injunctions*

Let’s start with the rules regulating the degree of federal courts’ power to enjoin state proceedings. Federal courts have construed their authority to issue antisuit injunctions against state proceedings quite narrowly, with the result that federal courts generally will not

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158. 28 U.S.C. § 2283 (2012).

159. *See supra* subsection III.A.2.

160. *See supra* notes 6 and 106 and accompanying text.

161. This part of the Article draws in part on discussion in a previous article, *The Checks and Balances of Forum Shopping*, *supra* note 11, but adopts a different focus—on allocation of claim-control rights, rather than forum shopping writ large.



enjoin in personam actions in state court even if they overlap a federal action.<sup>162</sup>

The interpretation flows from federal courts' construction of the Anti-Injunction Act and the All Writs Act. Neither the AIA nor the AWA are crystal clear. The All Writs Act is power conferring and grants authority to issue injunctions "necessary . . . in aid of" federal courts' jurisdiction.<sup>163</sup> The AIA is power limiting and bars a federal court from staying proceedings in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>164</sup> Despite the statutes' differences in language and purpose, the Court has construed both statutes in tandem, reading them to incorporate the same narrow set of constraints on the scope of antisuit injunctions.

The current, narrow construction of both statutes is driven by an interpretive canon: "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."<sup>165</sup> This is a resistance norm. And the resulting broad ban on antisuit injunctions dials down the preemptive power of federal courts, leaving expansions to Congress subject to a clear statement condition.

That construction of the AIA does not vitiate federal courts' power to preempt state resolution of issues on the federal agenda. But it limits by degrees. It does so by allowing different (or even the same) litigants to put the same issues on federal and state agendas simulta-

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162. See *supra* subsection III.A.2.

163. 28 U.S.C. § 1651(a) (2012).

164. *Id.* § 2283. The current version of the Act codifies exceptions recognized in the nineteenth century. Evidence in recent, illuminating articles by James Pfander and Nassim Nazemi disproves the conventional view that these exceptions were "judge-made," contrary to the intent of Congress in 1793. James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 5 (2013). Pfander and Nazemi show that the 1793 Act was probably intended to "foreclose[ ] original actions in a federal court of equity to raise equitable defenses to a pending state court proceeding." *Id.* at 7. But, it was not intended to displace ancillary injunctions to enforce traditional equitable priority over suits at law in actions originally commenced in a federal court of equity. See James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187 (2014). Although Pfander and Nazemi at one point suggest otherwise, see *id.* at 241, their work actually tends to reinforce the validity of the principle, discussed above, that federal courts should narrowly construe their antisuit injunction authority, since it eliminates the standard objection that this restrained approach is a departure from early practice—the early practice adhered to a traditional body of equitable law adopted when the first Congress conferred equitable jurisdiction on federal courts.

165. *Atlantic Coast Line R.R. Co. v. Bhd of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970).

neously, subject to the generally accepted rule that the first court to win the race to a judgment dictates the outcome of the litigation.<sup>166</sup> The result is that parties can use their power to put issues on the state agenda to hedge against the preemptive risks threatened by a federal proceeding. And, as a result, the resistance norm here accordingly regulates not only judicial preemption but also agenda setting within the federal system.

## 2. *Jurisdiction*

While the Anti-Injunction Act calibrates the *degree* of federal judicial preemption, what can be preempted depends on what issues or interests can get on the federal agenda in the first place. In general, a federal judgment will not preempt state consideration of an issue or interest that did not get on the federal agenda. Thus, dialing up the scope of issues and interests that can get on the federal agenda dials up the *scope* of what can be preempted by federal judgments.

Here, too, the Court has insisted that Congress controls the dial, and has turned to resistance norms to enforce this understanding. The modern Court has repeatedly hewed to the idea that jurisdictional grants should, where possible, be given narrow constructions, perhaps most famously in Justice Scalia's broadside in *Finley v. United States*<sup>167</sup> against federal courts' assertion of pendant party jurisdiction without explicit congressional approval.<sup>168</sup> The canon that grants of federal jurisdiction will be presumed concurrent unless Congress clearly specifies otherwise, reaffirmed in *Tafflin v. Levitt*,<sup>169</sup> is another familiar example of the principle in action.<sup>170</sup> But there are other examples, and what is less widely acknowledged is the degree to which these define not only what gets put on the federal agenda but who can put it there.

The canon that removal rights will be construed narrowly, announced in cases like *American Fire & Casualty Co. v. Finn*,<sup>171</sup> illustrates.<sup>172</sup> Most grants of removal jurisdiction, like those contained in the general removal statutes, do not add to preexisting definitions of

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166. See RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 14 cmt. a (AM. LAW INST. 1982); see *supra* note 114 and accompanying text.

167. 490 U.S. 545 (1989).

168. *Id.* at 554.

169. 493 U.S. 455 (1990).

170. *Id.* at 459–60.

171. 341 U.S. 6 (1951).

172. *Id.* at 17–18 (noting removal jurisdiction is “carefully guarded” from “expansion by judicial interpretation”); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941) (noting removal jurisdiction is narrowly construed).

subject matter jurisdiction.<sup>173</sup> Instead they reallocate control over who can invoke the federal jurisdiction granted in § 1331 and § 1332—shifting that control from plaintiffs to defendants.<sup>174</sup>

Against the backdrop of jurisdictional concurrency, removal affects the federal–state equilibrium on two fronts. First, it shifts the power to set the agenda from plaintiffs, who have historically preferred state court, to corporate defendants, who have historically preferred a federal forum.<sup>175</sup> Second, particularly in mass claims arising out of a single course of wrongdoing, shifting agenda-setting power from plaintiffs to defendants has a concentrating effect. It does so by shifting control over agenda setting from a decentralized network of plaintiffs to a single, pro-federal removing defendant.<sup>176</sup>

The presumption against removal can thus be understood as a resistance norm that regulates the federal agenda indirectly by defining *who* can set the federal agenda. It fixes the dial at a default setting that decentralizes agenda setting, spreading issues and interests across the state–federal boundary as a result. Congress must speak clearly if it wants to turn the dial and concentrate agenda setting in the hands of defendants. Congress controls the dial because, like expansions of subject matter jurisdiction, shifts in agenda-setting authority affect the federal agenda and, with it, the balance of federal–state power.

The well-pleaded complaint rule is much to the same effect. To be sure there are differences. Unlike removal rules, which are at bottom forum transfer rules, the well-pleaded complaint rule defines the subject matter that federal courts can hear—namely, cases where the plaintiff's theory of relief requires proving a substantial, and disputed, federal issue.<sup>177</sup> But by linking the existence of federal question jurisdiction to the theory of relief the *plaintiff* opts to assert, it gives plaintiffs the ability to forestall removal by asserting a state-law rather than a federal theory.<sup>178</sup> This gives plaintiffs the power to exploit

173. 28 U.S.C. § 1441(a) (2012) (authorizing removal of “any civil action brought in a State court of which the district courts of the United States have original jurisdiction”).

174. *Id.*

175. See Moller, *supra* note 11, at 133–34.

176. This is one effect of the Class Action Fairness Act (CAFA), although one that can be easily mischaracterized. For a discussion of the relationship between federal standing principles and CAFA, see *infra* subsection III.D.2.

177. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005); Smith v. Kan. City Title & Tr. Co., 255 U.S. 180 (1921).

178. See, e.g., Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 12 (2003) (“The [well-pleaded complaint] rule makes the *plaintiff* the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” (emphasis added)); see also Moller, *supra* note 11, at 135–36 (explaining how the well-pleaded complaint rule reallocates control over forum shopping from defendants back to plaintiffs).

their control of the complaint and the theory of the case to control whether the case gets on the federal or state courts' agenda, while simultaneously limiting defendants' removal rights.

By doing so, the rule limits removal's centralizing effect—it shifts control over the agenda away from defendants targeted with multiple claims and back to a decentralized network of plaintiffs. The well-pleaded complaint rule thus defines federal subject matter jurisdiction while also regulating who wields agenda-setting power within the federal and state system. Like the removal statutes, it regulates not just the federal agenda, but also agenda setters.

The well-pleaded complaint rule is notoriously absent from the text of 28 U.S.C. § 1331.<sup>179</sup> Federal courts read it into the statute, which they have treated less as a command than as a loose delegation of authority to develop the terms of their own subject matter jurisdiction in a common-law like fashion. The most principled justification for reading the well-pleaded complaint rule into § 1331 lies with the same resistance norm that regulates removal—the norm, articulated in cases like *Finn* and *Finley*, that, in the service of localism, judicial restraint, and congressional control of federal jurisdictional policy, federal courts ought to construe their authority narrowly, absent a clear congressional direction to the contrary.<sup>180</sup>

The point here is that appreciating the well-pleaded complaint rule's dual role—as a narrow construction of federal subject matter jurisdiction *and* as a rule that also decentralizes federal agenda setting—again underscores the plausibility of interpreting that resistance norm to extend to rules that regulate *who* sets the agenda as well as what issues can get on that agenda.

### 3. *Erie and Hanna*

The *Erie–Hanna* caselaw, similarly, can also be analyzed using process federalism and resistance norms. And like the caselaw on anti-suit injunctions, removal, and the like, *Erie* cases also use resistance norms to police not only the relative share of federal and state control over substantive policymaking (the standard lens through which the cases are reviewed), but also to regulate agenda setters and agenda setting. Rather than directly regulating who wields agenda-setting power, the *Erie–Hanna* framework regulates inputs that affect the *incentives* of agenda setters to pick a federal or state forum.

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179. 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

180. *Finley v. United States*, 490 U.S. 545, 554 (1989); *Am. Fire & Cas. Ins. Co. v. Finn*, 341 U.S. 6, 17 (1951).

I explored the idea that the *Erie-Hanna* line of cases incorporates a resistance norm in a previous article.<sup>181</sup> My argument there turns less on the terms of the original decision itself (a decision notoriously evasive about the exact basis for its holding),<sup>182</sup> than on subsequent modifications, particularly those of *Hanna v. Plumer*,<sup>183</sup> a case concerned with lawmaking in the gray area between substance and procedure.

In *Hanna*, the Court articulated two separate approaches to the choice of law question posed by federal rules ostensibly regulating federal procedure. Rules developed through judicial decision making—ostensible “procedural” common law—generally must give way to conflicting state rules if federal–state nonconformity is likely to incentivize forum shopping or result in the inequitable administration of the law.<sup>184</sup> (Rules that serve important federal policies, ala *Byrd*, are the exception).<sup>185</sup> On the other hand, rules embodied in a federal statute or promulgated under the Rules Enabling Act govern, so long as they are within the scope of Congress’s constitutional authority and also do not violate the Enabling Act’s prohibition on rules that abridge, alter, or modify “substantive law.”<sup>186</sup>

The *Erie-Hanna* framework is often explained in “choice of law” terms, but one can instead approach it from the standpoint of authority.<sup>187</sup> As I previously argued, one way to frame *Hanna* is as a framework about authority to adopt rules that affect litigants’ incentives to opt for a federal rather than a state forum.<sup>188</sup> The idea can be described in terms of an analogy to the role of product differentiation in a competition between market competitors.<sup>189</sup>

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181. Moller, *supra* note 11, at 140–48. Michael Steven Green has also independently argued, albeit on grounds distinct from those argued below, that separation of powers concerns related to Congress’s control of federal courts explains the boundaries of the twin-aims test. Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1900–02 (2013) (arguing the twin-aims test respects fidelity to the purposes behind Congress’s grant of diversity jurisdiction, by ensuring exercise of diversity jurisdiction is confined to those purposes).

182. Moller, *supra* note 11, at 146 & n.161.

183. 380 U.S. 460 (1965).

184. *Id.* at 468–69.

185. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537–38 (1958).

186. *Hanna*, 380 U.S. at 468–69 (“When a situation is covered by one of the Federal Rules,” the court can “refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”).

187. Examples of a choice of law focused analysis of *Erie* include Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1 (2012).

188. See Moller, *supra* note 11, at 140–42.

189. *Id.* at 141.

Firms unable to compete on price can compete for market share through product differentiation. Much the same holds true for federal and state courts—differentiating federal procedures can draw litigants away from a state forum and into a federal forum.<sup>190</sup> Indeed, that differentiation has this effect is a central concern of the *Erie–Hanna* framework. A central prohibition imposed by “unguided *Erie*” analysis is that federal courts cannot apply rules that are different from those that would apply at the state level if the difference would be significant enough to litigants to induce them to engage in vertical “forum shopping.”<sup>191</sup>

*Erie*’s forum shopping concern can also be reframed in terms of a concern about agenda setting. Because differentiating the rules that regulate federal litigation can pull litigants away from state court and into federal court, constraining federal courts’ differentiation of the rules that apply in that forum affects, on the margins, what litigants choose to put on the federal agenda. If, by differentiating the rules they apply, federal courts make themselves more attractive to litigants, then constraining federal courts’ ability to adopt rules that attract litigants into the federal system also imposes a limit on federal courts’ ability to influence what gets on their agenda.

Thus we can see *Hanna*’s test and traditional standing rules as flip sides of the same coin: Together both shape the federal agenda. Traditional standing rules, like the jurisdictional rules discussed earlier, define who sets the agenda. *Hanna*’s test deals with their incentives.

This opens to the way to framing *Hanna*’s anti-differentiation rule in terms of checks and balances, rather than discretionary “choice of law.” Federal courts do not control their own agendas. Federal courts therefore cannot expand what agenda setters can put on their agenda through jurisdictional constructions that are not expressly approved by Congress. Similarly, federal courts also cannot expand what gets on their agenda by unilaterally adopting rules of practice that, by design, attract interests and issues into federal court.

*Hanna* is not inconsistent with this idea. If anything, the idea justifies *Hanna*’s very different treatment of rules approved by the federal political process. “Unguided” *Erie* analysis forbids courts from relying on their inherent power over federal judicial procedure to differentiate federal practice in a way that attracts litigants into federal court.<sup>192</sup> By contrast, the *Hanna* test discards the concern for forum shopping characteristic of unguided *Erie* analysis when the federal rule is the product of the political process.<sup>193</sup> Instead, it broadly per-

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190. *Id.* at 140–42.

191. *Hanna*, 380 U.S. at 468, 471 (characterizing the twin-aims test as involving the typical “unguided *Erie* choice”).

192. *Id.* at 468.

193. *Id.* at 471.

mits differentiation, and with it the attractive effect it can have on litigants, so long as Congress greenlights that differentiation.<sup>194</sup> Because Congress can impose any rules on federal courts that are “rationally capable” of classification as procedural, the scope for Congress’s (or its delegates’) differentiation of federal courts’ processes turns out to be quite broad indeed.<sup>195</sup>

The result fits the prescriptions of the institutional choice rule discussed in the last section: If our system of separated powers puts Congress, not federal courts, in control of the federal agenda, and differentiating federal courts’ processes from those of state courts ends up influencing what gets onto that agenda, then the corollary is that Congress ought also to make decisions about that differentiation. This is just what the *Hanna* framework requires, by directing that federal nonconformity with state practice must obtain the imprimatur of Congress or its authorized delegates.<sup>196</sup>

In effect, *Hanna*’s twin-aims test can be seen as the implementation of a constitutionally mandated resistance norm through a choice of law default rule, one whose concerns complement those animating jurisdictional default rules. Of course, it would be foolish to claim that concern for state substantive policy making is not *Erie*’s dominant theme. But it would oversimplify the richness of the post-*Erie* cases to emphasize that concern to the exclusion of other strands. Indeed, it is a by-now familiar point that the formal concepts of “substance” and “procedure” have ceased to do much real work in the broad range of cases governed by the *Hanna* framework. Today they operate as labels for conclusions that a federal rule regulating the litigation process either ought or ought not to apply in a given case based in significant part on concerns orthogonal to the traditional concern for allocating substantive lawmaking authority in the federal system.<sup>197</sup> One of those values, I am claiming, is the checks and balances norm that federal courts do not control their own agenda.

194. *Id.*

195. *Id.* at 472 (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”); see also *id.* at 476 (Harlan, J., concurring) (characterizing the majority as adopting an “arguably procedural, ergo constitutional” test).

196. See Moller, *supra* note 11, at 144.

197. *Hanna*, 380 U.S. at 468 (distinguishing substance and procedure in unguided *Erie* analysis by reference to *Erie*’s concerns about forum shopping and inequitable administration of the law); see also Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 Nw. U. L. REV. 1, 11-12 (2012) (recounting how the Court, post-*Erie*, drifted toward treating “procedural” and “substantive” as labels for conclusions that federal nonconformity would offend “policy *Erie*”).

#### 4. *Implied Rights of Action*

The last two subsections showed how existing resistance norms police who can be an agenda setter, and the incentives of agenda setters to invoke federal jurisdiction. Existing resistance norms also regulate the right of action, or source of enforcement power, itself. Since the 1970s, the Supreme Court has insisted that Congress alone has the power to create federal private rights of action.<sup>198</sup> To enforce Congress's control over their creation, it has, moreover, construed federal statutes against the implication of private rights of action—requiring Congress, in effect, to speak clearly if it wants to vest private parties with enforcement powers.<sup>199</sup>

Most accounts of this resistance norm are built on top of a reductive association of private rights of action with “substantive law.”<sup>200</sup> Congress, the usual account goes, controls the creation of private rights of action because that creation is an act of substantive lawmaking. And so federal courts should safeguard Congress's legislative supremacy by reassuring themselves that it clearly intended to create a private right of action before they recognize one.

But, in reality, the implication of rights of action involves both substantive and procedural lawmaking. The recognition of a right to relief is substantive. But, as section III.A explored, a private right of action also defines an interest that can get on the judicial agenda.<sup>201</sup> The agenda-setting impact of recognizing a private right of action can, as I discussed earlier, be characterized as “procedural.”<sup>202</sup>

If the recognition of a right of action has both a substantive and a procedural dimension,<sup>203</sup> it should not be surprising that procedural

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198. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (“The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.”).

199. *Id.* at 571 (noting that the implication of a private right of action in the face of congressional silence is a “hazardous” enterprise); *see also Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008) (emphasizing that courts must exercise “restraint” when considering whether a statute creates a private right of action, consistent with the “established principle that ‘[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .’”) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 746–47 (1979) (Powell, J., dissenting)).

200. *Clark*, *supra* note 10, at 1422–24 (framing the Court's restrictive approach to implied rights of action as an outgrowth of separation of powers principles governing substantive lawmaking).

201. *See supra* subsection III.A.1.

202. *See supra* section II.C.

203. Many rules have substantive and procedural dimensions. Statutes of limitations are classic examples. Laura Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363 (1986) (“[T]he forced dichotomy between substance and procedure is particularly artificial in the context of limitations periods because such statutes simultaneously serve both substantive and procedural function.”).



concerns also color the development of the implied rights doctrine. Protecting legislative control over substantive policy making is undoubtedly the main theme. But the agenda-setting concern bubbles up occasionally in the Supreme Court's explanation of the doctrine, as well.

It was gestured at, first, in Chief Justice Stone's dissent in *Bell v. Hood*.<sup>204</sup> In *Bell*, the plaintiffs asserted a *Bivens*-style federal cause of action against FBI agents based on their alleged violations of the plaintiffs' Fourth and Fifth Amendment rights.<sup>205</sup> Although the cognizability of a *Bivens*-like constitutional tort action was then an open question, the Court upheld federal jurisdiction, reasoning that federal question jurisdiction depends only on the assertion of colorable federal cause of action.<sup>206</sup> In a brief dissent, Chief Justice Stone complained that the Court's decision would accomplish little more than "transfer to the federal court" of a dispute which ordinarily would be tried under state law in state courts.<sup>207</sup>

On one interpretation, Stone seemed to mean nothing more than that an exercise of federal jurisdiction was unwarranted because, in his view, the plaintiffs' *Bivens*-like theory was frivolous. In *Cannon v. University of Chicago*,<sup>208</sup> though, Justice Powell fleshed out Stone's gripe into a full-blown separation of powers argument. "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve."<sup>209</sup> This, said Powell, "runs contrary to the established principle that '[the] jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation" and also "conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction."<sup>210</sup> Recent implied-rights cases have leaned heavily on this "jurisdictional" objection.<sup>211</sup>

The verdict of most commentators is that Powell's jurisdictional argument against implied rights of action was unconvincing. That ver-

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204. 327 U.S. 678 (1946).

205. *Id.* at 679.

206. *Id.* at 682 (noting "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction").

207. *Id.* at 686 (Stone, C.J., dissenting).

208. 441 U.S. 677 (1979).

209. *Id.* at 746 (Powell, J., dissenting).

210. *Id.* at 746-47 (Powell, J., dissenting).

211. *See, e.g., Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) (noting the recognition of an implied right of action "necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .'" (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 746-47 (1979) (Powell, J., dissenting) (citations omitted)).

dict seems correct if Powell's argument is confined to concerns about jurisdiction over the case in which the right of action is implied. Complaints that federal courts bootstrap themselves into jurisdiction over the case at hand by implying a right of action are inconsistent with *Bell's* holding that that federal question jurisdiction turns on the existence of a colorable federal *question*—which embraces, of course, questions about the existence of a privately enforceable federal remedy, as well as about the conditions for obtaining it.<sup>212</sup>

But the argument is much more compelling if the concern is viewed from a prospective, system-level standpoint that embraces the class of disputes in which the private right is implied, rather than as a concern localized to the specific case in which the merits of the implied action are initially debated. Recognizing a private federal right of action in one case creates a precondition for the exercise of federal question jurisdiction over a class of similar injuries in future cases, and so has an obvious gravitational effect on which disputes—and which interests—end up in the federal system.<sup>213</sup>

This angle—which focuses on the system effect of way the question about the existence of a federal right of action is resolved—is probably the most coherent way to view Powell's "jurisdictional" objections. Implication of rights of action is jurisdictional in a loose sense—it relates to the subject matter and the interests that can be put on the federal judicial agenda. Implication in the face of congressional silence is a "hazardous" enterprise, as then-Justice Rehnquist would put it,<sup>214</sup> not simply because it involves substantive lawmaking—but also because it offends the basic norm that federal courts do not control their own agenda. Like all decisions affecting the interests that can get on the federal agenda, that is a matter for the political process, and therefore subject to the same resistance norm that applies to other doctrines that regulate agenda setting.

##### 5. *Congress's Control of the Concurrency System*

Together, the preceding sections underscore that the principle that Congress controls jurisdictional policy isn't confined to jurisdiction in the narrowest sense. What gets on the federal agenda is the function of a variety of inputs—"jurisdictional" and "non-jurisdictional." These inputs construct a *system* of concurrency that reaches well beyond the simple question, considered in cases like *Tafflin v. Levitt*, whether a grant of subject matter jurisdiction is exclusive or concurrent.<sup>215</sup>

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212. *Bell v. Hood*, 327 U.S. 327, 678 (1946).

213. Moller, *supra* note 11, at 145–46.

214. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979).

215. 493 U.S. 455, 459–60 (1990).

The implied rights doctrine places control over rights of action in the hands of Congress. Standing norms particularize who within the class of privately injured parties controls the right of action. And the traditional private law standing rule does so in a way that spreads the resolution of different interests among federal and state courts by decentralizing agenda setting among a diffused network of claim owners.

The presumption against removal and the well-pleaded complaint rule, in turn, reinforce the systemic effect of private law standing norms, by taming the centralizing potential of removal. *Erie* is much to the same effect: It cuts off federal courts' ability to manipulate federal practice in an effort to attract defendants into federal court. And restraints on antisuit injunctions complete the picture by supplementing the porous system of concurrency with additional constraints on the scope of federal preemption.

Viewed against the backdrop of a traditional private law standing default, each of these doctrines coalesce into mutually reinforcing system of concurrency, one that constrains the scope of what gets on federal courts' agenda through a property strategy. And, crucially, each doctrine is the product of resistance norms that plausibly reflect the principle that Congress sets jurisdictional policy writ large—in the sense that it controls not only what can get on the federal agenda, who puts it there, and their incentives to do so.

At the heart of this system is the traditional standing principle—claim-owners control their own claims. Changing it changes our system of concurrency, and that, the preceding sections underscore, is Congress's job.

#### D. Miscellaneous Objections

This last section ends by dealing with a few miscellaneous potential objections.

##### 1. “What about the Rules Enabling Act?”

One possible objection to the argument in this Article is that Congress's delegation of rulemaking authority to federal courts obviates separation of powers or federalism concerns with more expansive judicial interpretations of the class action rule.<sup>216</sup> But this objection flies in the face of the fact that Congress has delegated rulemaking authority subject to conformity to a detailed set of administrative processes (including approval of changes by the Civil Rules Advisory Committee), whose features replicate many of the inertial, democratic checks

216. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 336 (2012) (noting this argument for federal courts' interpretive discretion).

on rulemaking that exist within the legislative system writ large.<sup>217</sup> The experience with the federal rulemaking scheme indeed suggests that its inertial drag on federal rulemaking is, at best, only marginally less constraining than Congress's lawmaking process—at least with respect to major, normatively contested changes to the federal procedural system.<sup>218</sup>

Catherine Struve has convincingly argued that given the existence of the rulemaking system, and Congress's direction that changes must pass through it, federal courts have an obligation to stick with long-standing interpretations of the federal rules rather than updating those rules through dynamic interpretation.<sup>219</sup> Whether or not you buy that argument as a general matter, the separation of powers norms described above—which assign Congress control over jurisdictional policy in order to funnel expansions of federal jurisdiction through the checks of the political process—point in a similar direction, but with even greater force, in the case of procedures that derogate from traditional private law standing.

The point is a natural implication of the rationale for Congress's control of jurisdictional policy. Our constitutional system makes the political process a federalism safeguard. If Congress directs that changes that sidestep the political process must instead come through a different quasi-administrative process that incorporates its own inertial checks on federal lawmaking, the same checks and balances logic that requires deference to Congress ought to obligate federal courts to leave changes to federal rules to *the rulemaking system Congress has set up and from which it has directed changes to the federal rules must come*, in equal measure.

Moreover, as I have argued in another article, there is good reason to think that procedural rules that force litigation into the federal system, like the class action, are at the very edge of the rulemaking power conferred under the Rules Enabling Act and consistent with it only when such rules are essential to the enforcement of litigants' substantive rights.<sup>220</sup> The 1938 rulemakers, incidentally, agreed: By passing Federal Rule 82, they underscored their understanding that the Enabling Act did not confer the power to affect federal jurisdiction. It's a short step from this to concluding that the Enabling Act is also a very questionable source of authority for rules that effectively force claim owners to file their claims in federal court, as class actions do.

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217. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

218. Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 688–89 (2011).

219. Struve, *supra* note 217, at 1102 (“Congress’s delegation of rulemaking authority should constrain, rather than liberate, courts’ interpretation of the Rules.”).

220. Moller, *supra* note 11, at 163–66.

This is a reason not only for the Court, but also rulemakers, to tread cautiously when it comes to further expansion of the availability of the class action—leaving innovations to Congress by limiting the scope of the rule to cases where representative enforcement is plainly essential to the enforcement of the underlying substantive scheme, as I am advocating here.<sup>221</sup>

But whether we conceive separation of powers as a reason for courts to defer to the rulemaking process or as a reason for courts *and the rulemaking system* to defer to Congress is somewhat of a side issue, and one about which I am ultimately agnostic. The key point is that separation of powers principles foreclose decisions by the Supreme Court to update the class action rule *unilaterally*, through reinterpretations of the existing rule. Doing so clearly offends separation of powers norms.

## 2. “What about the Class Action Fairness Act?”

The 2005 Class Action Fairness Act<sup>222</sup> has changed the subject matter jurisdiction rules applicable to class actions in some significant ways. Some readers may object that in doing so, it has undermined the case above for construing Rule 23 narrowly.

There is substantial difference, even after CAFA, between a regime in which federal courts enforce the narrow understanding of Rule 23 reflected in the Court’s current precedents and one in which federal courts employ an expansive conception of Rule 23. The former, by maintaining a broader sphere for the traditional, uncoordinated, individualized model of litigation, tends to spread resolution of that litiga-

221. *Id.* at 163–64. It is worth noting, in this regard, that the approach suggested here replicates an approach courts already take with the other federal rules that force claims into the federal system: Rule 13 and 19. Federal courts have given Rule 19 a narrower construction than its text arguably warrants. *See, e.g.,* Temple v. Synthes Corp., Ltd., 498 U.S. 5 (1990); Eldredge v. Carpenters 46 N. Cal. Ctys. Joint Apprenticeship and Training Ctr., 94 F.3d 1336 (9th Cir. 1997). Rule 13, similarly, has been construed narrowly by some courts in light of federalism concerns, an approach consistent with the structural themes in this Article. *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (2d Cir. 1982); *Daughtrey v. First Bank & Tr. Co. of South Bend*, 435 F. Supp. 218 (N.D. Ind. 1977). Intervention under Rule 24 also has the potential to shoehorn interests into the federal system that ordinarily could not get there. But, restrictive constructions of Rule 24(a) standing articulated in some circuits avoid that possibility by requiring intervenors to meet all of the requirements of Article III standing, including a cognizable right of action. *See, e.g.,* Ragsdale v. Turnock, 941 F.2d 501 (7th Cir. 1991) (requiring intervenors of right to demonstrate all of the requirements for Article III standing, including a right of action); *see also* Jay Tidmarsh, *Unattainable Justice and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1788 n.58 (1992) (noting the Court’s narrow interpretation of compulsory joinder rules). The approach here is consistent with all of these approaches.

222. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

tion back across many different courts, federal as well as state.<sup>223</sup> The latter would centralize the *resolution* of mass litigation in federal court.

The choice to adopt the latter model is a significant one. Yet, as Judge Lee Rosenthal emphasizes, Congress simply has not made that choice. CAFA deals with one feature of the concurrency system—the scope of federal subject matter jurisdiction and limitations on removal in cases filed as class actions or when claims of a certain quantity are proposed for consolidation. It does not address its other moving parts, like antisuit injunctions and *Erie*. Most importantly, its operative provisions say nothing about the subject of this Article—the extent to which Rule 23 displaces traditional standing principles.

And so, as she says, nothing in the statute prevents a federal court from continuing to “follow a decentralized model [of mass tort litigation] by declining to certify the cases as class actions” and thereby remitting marketable claims to uncoordinated, individually controlled litigation subject to the ordinary, pre-CAFA rules of subject matter jurisdiction.<sup>224</sup> That’s, indeed, exactly what federal courts are doing. And, for some CAFA proponents, surely, raising the resulting added hurdles to aggregation, and with it the centralized resolution of national market cases, was the whole point of the statute. It is not for nothing that CAFA was enacted just three years after Judge Easterbrook’s famous denunciation of the class action as an ill-advised “central planning” model of mass tort resolution.<sup>225</sup>

The CAFA objection accordingly is a serious misapplication of the principle that Congress controls federal jurisdictional policy. Federal courts have respected the precision and intricacy of the concurrency system by refusing to infer from Congress’s decision to alter one part of concurrency system the authority to alter parts that Congress has not touched. The Supreme Court has recently reaffirmed this principle in *Smith v. Bayer Corp.*,<sup>226</sup> by refusing to find in CAFA a reason to expand the scope of antisuit injunctions or class preclusion, areas of law CAFA says nothing about.<sup>227</sup>

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223. See *supra* subsection III.A.1.

224. See Lee H. Rosenthal, *Back in the Court’s Court*, 74 UMKC L. REV. 687, 706 (2006).

225. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); see also Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 613 (2008) (noting the expectation of CAFA’s supporters that federal courts would decline to certify nationwide class actions, and characterizing CAFA as an “indirect” protection for *states* from other states’ attempts at horizontal aggrandizement) (emphasis added)).

226. 564 U.S. 299 (2011).

227. *Id.* (refusing to infer from CAFA’s alteration of subject matter jurisdiction rules authority to expand the scope of class preclusion or the reach of federal antisuit injunctions).

That makes a good deal of sense if we are really serious about protecting Congress's primacy over jurisdictional policy. And it means that CAFA also has no effect on the scope of Rule 23, something else the statute says nothing about. Treating it otherwise undoes federal courts' subordination to Congress.<sup>228</sup>

3. *"There is no federal common law!"*

It's true that one critical step in the argument above depends on my claim that traditional standing principles should be viewed as a surviving rule of federal common law. The misstep of this objection, though, is the exact same misstep committed by advocates of the "substantive rights" theory of litigant autonomy. It falls back into thinking about traditional standing exclusively as a substantive policy.

As noted throughout the argument above, traditional standing can serve either substantive or procedural goals.<sup>229</sup> Rights of action sometimes embed a "standing" principle for substantive reasons—to respect litigants' dignity or autonomy.<sup>230</sup> But, at a minimum, standing always serves a procedural function—it defines who can come into federal court and set the judicial agenda.

It's the procedural function of standing that's the key to defending the argument against *Erie*. *Erie*, of course, wipes out substantive common law.<sup>231</sup> But it didn't wipe out "procedural" common law. When, as is so often the case, substantive law doesn't embed a substantive standing principle, the claim here is that standing rules are supplied, at the federal level, by federal procedure: by a mix of unwritten procedural law (traditional standing norms) that regulate the federal judicial system, subject to exceptions contained in Rule 23.

Of course, *Erie*, after *Hanna*, does generally test common law principles that are rationally capable of classification as procedural according to the twin-aims test, as I discuss earlier.<sup>232</sup> But *Byrd*, as I've noted, exempts procedures that serve important federal procedural policies from that test's ambit.<sup>233</sup> And the punchline of the argument above is that traditional standing, considered as a procedure, serves

228. I explore this objection in much more detail in *The New Class Action Federalism*, 48 AKRON L. REV. 861 (2015).

229. See Rutherglen, *supra* note 67, at 284 (noting that the claim-control right has substantive and procedural aspects).

230. See *supra* note 78 and accompanying text.

231. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare *substantive* rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

232. See *supra* note 184 and accompanying text.

233. See *supra* notes 140–149 and accompanying text.

just such an important policy—it is, indeed, an important cornerstone of our scheme of federalism.

That's why the traditional standing rule survives *Erie*. And that's why it's exempt from the twin-aims test. It is a customary restraint on federal courts, one that's rationally capable of classification as procedural, and one that is integral to our traditional system of limited jurisdiction. This customary rule can be displaced at the federal level, including through Rule 23. But its function in our jurisdictional system also supplies a reason, this Article has labored to show, to construe Rule 23 narrowly.

In the process, litigant autonomy is revealed as just one more example of what's actually a not-uncommon phenomenon: a traditional federal common law rule is “entrenched against change,” and protected from *Erie*, by separation of powers principles.<sup>234</sup>

#### 4. “*I don't like the outcome.*”

Finally, some readers may object that they just don't like the outcome. Conservatives, who tend to think state-level judges are overly plaintiff-friendly, may object to the argument's solicitude for state courts' continued role in the remediation of mass injuries. One such distinguished commentator, indeed, called the argument here a “plaintiffs' lawyers' dream” and did not mean this as a compliment. Technocrats will lament the inability to consolidate claims in a single, “efficient” forum. Progressives will lament the loss of the leveling power that federal, nationwide class actions bring to plaintiffs battling institutional defendants in mass tort litigation.

In some ways, as a normative matter, the argument here has something for everyone to hate. Why adopt it, then?

We should adopt it because we don't get to follow separation of powers principles, or not, depending on whether we like, or don't like, the outcome. The post-New Deal understanding of separated powers and federalism doesn't exempt the judiciary from the system of checks and balances; it checks the national judiciary and the national political branches alike, in the judiciary's case by putting Congress in charge of federal courts and the concurrency system.<sup>235</sup> That leads to some messy results sometimes, as does our system of checks and bal-

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234. Cf. Anthony Bellia & Bradford Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1799 (2010) (making an analogous point—that constitutional structure entrenches a preexisting common law rule—with respect to traditional rules of the law of nations).

235. In this way, it departs from the *Lochner* era that preceded it, which viewed federal courts as standing outside and above the realm of federalism and checks and balances. See Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L. J. 1513 (2002).



ances and federalism more generally.<sup>236</sup> But excepting claim-control rights from this messy system just because we don't like the result would be distressingly unprincipled.

And, anyway, its not clear federalism leads to such a bad outcome. There are many respectable arguments for decentralization and federal-state power sharing in the complex litigation arena. Judge Easterbrook and Bruce Kobayashi argue that decentralized litigation of mass torts improves information about the value of claims and so minimizes error costs.<sup>237</sup> Richard Epstein (a once-upon-a-time defender of a state role in complex litigation) argued making states take responsibility for some significant share of mass tort litigation makes state courts better managers of complex litigation, an argument that echoes Paul Bator's defense of judicial federalism from an earlier era.<sup>238</sup> Judicial management of complex litigation is a value-laden project at the intersection of an intense partisan debate about court access and procedural justice, and Ernest Young urges that federal-state judicial power sharing helps prevent one set of ideological commitments from coloring the resolution of cases.<sup>239</sup> Finally, J. Maria Glover has shown that courts, in our post-class action era, are grappling with the costs of decentralizing the litigation of mass torts through more effective, creative state-federal cooperation and coordination.<sup>240</sup> For every argu-

236. See, e.g., Young, *supra* note 132, at 122 ("Federalism is untidy.").

237. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); Bruce Kobayashi, *An Economic Analysis of Relitigation Rules in Intellectual Property Litigation* (draft on file with author) (arguing relitigation of issues that recur in duplicative cases can help minimize error costs and critiquing current rules of nonmutual preclusion on this ground).

238. Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J. L. & COM. 1, 21 (1990) ("The intellectual exchange that takes place in the appellate cases across states may help to hone arguments and to clarify ambiguity. It offers a modest spur toward excellence and invention that is lost if any single monolith controls the power to make and disseminate" tort law.); cf. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624 (1981) ("Competence and sensitivity are themselves not static phenomena. Conscientiousness, dedication, idealism, openness, enthusiasm, willingness to listen and to learn—all the mysterious components of the subtle art of judging well—are at least to some extent best evoked by a sense of responsibility.").

239. See Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1795 (2007) ("[S]tate courts are selected and sometimes curbed by communities in which the correlation of political forces may be quite different from that at the national level. This diversification is significant because no one is certain that the way federal judges are appointed, confirmed, and checked is optimal."); Young, *supra* note 132, at 123 ("[H]istory teaches us that federal judges have their own foibles as lawmakers; our Constitution places its bet on a uniquely American form of mixed government.").

240. Glover, *supra* note 1, at 25–31 (proposing that "coordinated redundancy" can help improve the information available to settling parties and enhance the construction of mass tort settlement grids).

ment against decentralization and federalism in the realm of mass torts, there are some decent counterarguments.

Sorting out these normative debates is a task for other articles. The nice thing about a principled approach to separated powers, though, is that it acknowledges our system's flexibility to adjust the law as these arguments work their way toward some kind of consensus conclusion. If we decide further nationalization of mass tort management is a good idea, the political and federal rulemaking process can make further adjustments to achieve the desired national consolidation within the flexible boundaries of due process, including, I would argue, by expanding the scope of the federal class device along the lines suggested by scholars like Sergio Campos.

But there's no escaping the fact that that decision must, under our law, be made through the political and rulemaking process.

#### IV. CONCLUSION

There's little evidence legislatures think much at all about who controls the claims they create. If there is a special set of constraints on the scope of the class action, above and beyond due process, they flow from the fact that traditional standing principles are a body of preexisting, if unwritten, *procedures*, which have played an important role in the system of concurrency. They are procedures that can change—but not without, in the process, changing how concurrency works.

Congress and the rulemaking bodies it has designated to act in its stead, though, get to change that system. And federal courts administering that system accordingly should be on guard against finding “changes” that aren't clearly there. That provides an argument for cautiously, or “narrowly,” interpreting the one federal source of law that has, in fact, altered traditional standing principles to some extent—Rule 23.

The argument actually ends up offering a defense of current case law, but without the added baggage of positing that rights of action pervasively confer substantive rights to control them. It also avoids what is perhaps most pernicious about the “substantive rights” theory. That theory claims the mantle of judicial restraint, even as it subtly normatizes autonomy rights by claiming they are the focus of a widespread consensus pervasively embedded in statute after statute.

That would be fine if it were true as a descriptive matter. But it's not—who gets to control a claim is at the heart of the debate over class actions, and class actions remain politically divisive in the law and the larger culture. Federal courts shouldn't be in the business of declaring and enforcing an orthodoxy that doesn't exist. They should be in the much more modest business, this Article argues, of enforcing our system of separated powers in a principled way and leaving debates

about the class action where they belong: in the political process. And sticking to that business, it turns out, is an ample basis for defending the Supreme Court's approach to class certification.